MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

March 20, 2012, through May 29, 2012

JOHN O. JUROSZEK
REPORTER OF DECISIONS

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COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2013
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2013
AMY RONAYNE KRAUSE	2013
MARK T. BOONSTRA	2013[1]
MICHAEL J. RIORDAN	2013[2]

Chief Clerk/Research Director:
LARRY S. ROYSTER

[1] From March 20, 2012.

[2] From March 21, 2012.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015
MARILYN KELLY	2013
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2013

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner[1]
DANIEL C. BRUBAKER, Chief Commissioner[2]
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Crier: DAVID G. PALAZZOLO

[1] To May 1, 2012.

[2] From May 1, 2012.

TABLE OF CASES REPORTED

(Lines set in small type refer to orders appearing in the Special Orders section beginning at page 801.)

PAGE

PAGE

N

P

R

S

JUDGE

MARK T. BOONSTRA

Judge Mark T. Boonstra was born May 20, 1957, in Muskegon, Michigan. After graduating from Western Michigan Christian High School in 1975, he attended Michigan State University, where he graduated Phi Beta Kappa in 1979 with a Bachelor of Arts degree in Political Science. He then attended the University of Michigan, where he graduated in 1983 with both a Juris Doctor degree and a Master of Applied Economics degree.

Judge Boonstra was appointed to the Court of Appeals by Governor Rick Snyder in March 2012, replacing Judge Richard A. Bandstra, and he was subsequently elected in November 2012. Before his appointment, Judge Boonstra was a senior principal in the law firm of Miller, Canfield, Paddock and Stone, P.L.C., where he practiced law for nearly 27 years, including serving as a deputy chair of the firm's Litigation Practice group and as co-chair of its Appellate Practice section. At the time of his appointment, he was recognized in *Best Lawyers in America* in the areas of Antitrust Law; Appellate Practice; Bet-the-Company Litigation; Commercial Litigation; Litigation – Antitrust; Litigation – First Amendment; and Litigation — Securities. He previously also served as a law clerk to

the Honorable Ralph B. Guy, Jr., of the United States District Court for the Eastern District of Michigan, from 1983 to 1985. Judge Boonstra has been active in the State Bar of Michigan—including serving in the Representative Assembly (2005-2011) and as chair of the Antitrust, Franchising, and Trade Regulation Section (2000-2001)—as well as the Federal Bar Association and the Washtenaw County Bar Association, including as a founding member of the Washtenaw American Inn of Court (2011). He also currently serves on the Michigan Supreme Court Committee on Model Civil Jury Instructions and as vice-chair of the Michigan Judges Retirement Board. He also has been an author of, or contributor to, a number of legal publications and presentations, including the second (2002) and third (2007) editions of Introducing Evidence at Trial, (Institute for Continuing Legal Education); *Video hyperlinks*: *An effective tool in appellate advocacy*, Appellate Issues (Spring 2012) (Council of Appellate Lawyers, American Bar Association); and as the moderator and a faculty member of the Institute for Continuing Legal Education Webinar, *Michigan Jury Reform — What You Need to Know* (August 24, 2011).

Judge Boonstra has also served other community and civic organizations, including as chair of the Washtenaw Economic Club (2004-2005), president of the board of directors of the Christian Montessori School of Ann Arbor (2005-2010), and a board member of the Ann Arbor Area Convention and Visitor's Bureau (2011-2012). He also served as the chair of the Washtenaw County Republican Committee (2008-2012), and as a member of the Washtenaw County Apportionment Commission (2011), and is a 2002 graduate of Leadership Ann Arbor, a member of Webster United Church of Christ, and a long-time member of the Federalist Society.

Currently a resident of Dexter, Judge Boonstra and his wife, Martha Rabaut Boonstra, enjoy their Friesian horses and their four children, son Adam Boonstra and daughters Logan Boonstra, Katherine (Timothy) Gutwald, and Chea Tyrrell, and grandson Luke Gutwald.

JUDGE

MICHAEL J. RIORDAN

Governor Rick Snyder appointed the Honorable Michael J. Riordan to the Michigan Court of Appeals on March 16, 2012 and he was elected to a six-year term commencing January 1, 2013. Previously, Judge Riordan worked as an Assistant United States Attorney for the Eastern District of Michigan; as an Assistant General Counsel for the Northwestern Mutual Financial Network; and as a Senior Attorney in the Enforcement Division of the United States Securities and Exchange Commission. Upon his graduation from law school, Judge Riordan served a two-year clerkship to the Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan. Judge Riordan serves as a professor of securities regulation and business organizations at the University of Detroit Mercy School of Law and was named Adjunct Professor of the Year in 2010. Judge Riordan has been a member of the State Bar of Michigan's Board of Commissioners since 2006. He is a member of the Federalist Society, served as a past-president of the Michigan Lawyers Chapter and now serves on its board of advisors. He is the immediate past-president of the Federal Bar Association of the Eastern District of Michigan and is a past-president of

the Incorporated Society of Irish-American Lawyers. He is vice-president of the University of Detroit Mercy School of Law Alumni Association and is on the board of the Catholic Lawyers Society. Judge Riordan received his BA from Michigan State University and his JD, *cum laude*, from the University of Detroit School of Law.

COURT OF APPEALS CASES

CITY OF PLYMOUTH v LONGEWAY

Docket No. 300493. Submitted January 10, 2012, at Detroit. Decided March 20, 2012, at 9:00 a.m. Remanded for resentencing, 493 Mich 864.

Brittney Lynn Longeway was charged in the 35th District Court with operating a vehicle while intoxicated (OWI) under a city of Plymouth ordinance corresponding to MCL 257.625(1). A city of Plymouth police officer had been alerted that some women in a car had hit a concrete barrier when they entered a parking garage. While approaching the car, the officer noticed that the backup lights and brake lights of the car were on, after which the backup lights turned off. The transmission then appeared to have been put in park again, but the tires never moved. The car was still running when the officer spoke with Longeway, who was the driver of the car. She was arrested and charged with OWI. Longeway moved to dismiss the OWI charge, arguing that she had not been operating the vehicle at the time of her arrest. The district court, Michael J. Gerou, J., denied the motion, but the Wayne Circuit Court, Carole F. Youngblood, J. reversed and ordered that the charges be dismissed. The circuit court reasoned that because the car had not moved, Longeway had not been operating the vehicle within the meaning of MCL 257.625(1). The prosecution appealed by leave granted.

The Court of Appeals *held*:

Under MCL 257.625(1), a person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, if the person is operating while intoxicated. The word "operate," which is defined in MCL 257.35a as being in actual physical control of a vehicle, is clear and unambiguous. "Control" means "power or authority to guide or manage," "actual" means "existing in act, fact, or reality," and "physical" means "of or pertaining to that which is material." The circuit court erred by dismissing the OWI charge. Applying the statutory definition of "operate," Longeway was in actual physical control of the vehicle when she started the car, applied the brake, put the car in reverse, and then put the car back into park. Because this case did not involve a driver who was unconscious or

sleeping or a vehicle that was inoperable, it was not necessary to determine whether Longeway also placed the vehicle in a position posing a significant risk of causing a collision. *People v Wood*, 450 Mich 399 (1995), and its progeny, which discussed those and similar situations, did not apply to this case.

Reversed and remanded to the district court.

CRIMINAL LAW — OPERATING A VEHICLE WHILE INTOXICATED — DEFINITION OF OPERATING.

A person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, if the person is operating while intoxicated; "operate" is defined as being in actual physical control of a vehicle and includes the situation of a person who starts the vehicle's engine, applies the brakes, and shifts the gears from park to reverse and back to park without actually moving the vehicle (MCL 257.625[1], 257.35a).

Miller & Bartnicki, P.C. (by *Cameron A. Miller* and *Michael P. Bartnicki*), for the city of Plymouth.

Flood, Lanctot, Connor & Stablein, PLLC. (by *Janet A. Napp* and *Paul Bernier*), for Brittney Lynn Longeway.

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM. Defendant was charged with operating a vehicle while intoxicated (OWI) under an ordinance corresponding to MCL 257.625(1). She moved to dismiss the charge, arguing that she was not "operating" the vehicle as defined in MCL 257.35a. The district court denied defendant's motion, but the circuit court reversed and ordered that the charges be dismissed. Relying on *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), the circuit court found that because the vehicle had not "moved," defendant was not "operating" it. The prosecution appeals by leave granted. We reverse the circuit court's decision, remand for reinstatement of the charge, and hold that defendant oper-

ated the vehicle within the meaning of MCL 257.625(1) because she had "actual physical control" of the vehicle as set forth in MCL 257.35a. A person clearly has actual physical control of a vehicle when starting the engine, applying the brakes, shifting the vehicle from park to reverse, and then shifting back to park.

I. BASIC FACTS AND PROCEDURAL HISTORY

The facts of this case are not in dispute. On March 7, 2010, a doorman at a martini bar known as "336" alerted Officer Kevin Chumney that he had observed some females in a Pontiac G6 hit a concrete barrier when they entered the parking deck earlier that evening. The doorman advised Chumney that the females were leaving the bar and that they appeared to be drunk. Chumney saw the vehicle, which was legally parked. As he approached, another car backed out and he waited. While waiting, Chumney noticed that the backup lights of the Pontiac were on. He believed that the brake lights were on as well. After the other car drove away, Chumney hesitated because he did not want the Pontiac to back into him. The backup lights turned off, and it appeared that the transmission had been put into park again. The vehicle "settled a little bit," but the tires did not move. Chumney activated his overhead lights and blocked the car. He approached the driver's side and spoke to defendant, who was the driver. The vehicle was still running. Defendant stated that they were not leaving because they were looking for her friend's jacket.

Defendant was charged with OWI. In the district court, defendant moved to dismiss the charge and argued, in part, that she had not "operate[d]" her vehicle as that term was interpreted in *Wood* because the vehicle was stationary and was not in a position where it posed a

significant risk of causing a collision. The district court issued an order denying defendant's motion to dismiss. The district court cited the definition of "operating" in MCL 257.35a as "being in actual physical control of a vehicle regardless of whether or not the person is licensed under [the Michigan Vehicle Code]." Citing the *Wood* decision, the district court reasoned:

> In the instant case, the Court believes that Defendant did operate a vehicle in an area open to the public designated for parking that could have caused a collision with another vehicle or person. The police in-car video shows Defendant's vehicle running apparently in reverse with the driver's foot on the brake then shifted back into park with the driver's foot taken off the brake. While the vehicle wheels did not noticeably move, this Court finds Defendant was "operating" the motor vehicle.

Defendant appealed in the circuit court. Relying on *Wood*, the circuit court reversed, explaining:

> The Michigan Supreme Court has defined "operating" in *People v Wood*, 450 Mich 399, 404-405: "Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk."
>
> The district court erred when it found that the defendant was operating the vehicle as *Wood* defined operating. It is undisputed that the vehicle was never put in motion by the defendant. It is also undisputed that the car was legally and properly parked in a designated parking spot therefore it was not put in a position posing a significant risk of causing a collision.

We granted the prosecution's application for leave to appeal. *People v Longeway*, unpublished order of the Court of Appeals, entered May 16, 2011 (Docket No. 300493).

II. STANDARD OF REVIEW

This Court reviews de novo questions of statutory interpretation. *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006). In *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003), our Supreme Court set forth the following rules regarding statutory interpretation:

> When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. To do so, we begin by examining the language of the statute. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and the statute is enforced as written. Stated differently, a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [Citations and quotation marks omitted.]

III. ANALYSIS

Defendant was charged under MCL 257.625(1), which states:

> A person, whether licensed or not, shall not *operate* a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. [Emphasis added.]

MCL 257.35a defines "operate" as follows:

> "Operate" or "operating" means being in *actual physical control* of a vehicle regardless of whether or not the person is licensed under this act as an operator or chauffeur. [Emphasis added.]

Defendant does not dispute that she started the vehicle, applied the brakes to her running vehicle,

shifted the vehicle into reverse, and then shifted the vehicle back into park. The prosecution argues that although the vehicle did not move, defendant "operated" the vehicle by shifting gears from park to reverse and applying the brakes. This action, the prosecution claims, posed a danger to other drivers, even if the vehicle was legally parked. For her part, defendant argues that she neither placed the vehicle in motion nor placed the vehicle in a position that posed a significant risk of causing a collision; rather, she was using the vehicle for shelter when approached by the police officer. We do not believe either position is the appropriate framework to analyze this issue because both defendant and the prosecution fail to apply the plain language of the statute. The question is simply whether defendant's actions established "actual physical control" of the vehicle, MCL 257.35a, such that defendant was "operating" the vehicle in violation of MCL 257.625(1). We conclude that they did.

Rather than focusing on the unambiguous language of the relevant statutes, the parties, the district court, and the circuit court applied principles from *Wood*, which analyzed the meaning of "operate" when discussing the companion cases of *People v Pomeroy (On Rehearing)* and *People v Fulcher (On Rehearing)*, 419 Mich 441; 355 NW2d 98 (1984). In *Pomeroy*/*Fulcher*, our Supreme Court considered whether individuals who were arrested after being discovered unconscious in the driver's seats of running, but motionless, vehicles were operating the vehicles for the purpose of the statute that prohibited operating a motor vehicle under the influence of intoxicating liquor (OUIL). The Court cited the definition of "operator" in MCL 257.36 as "one who is in 'actual physical control' of a motor vehicle." *Id*. at 446. The Court explained:

> If the car had been in motion, the person in the driver's seat might have been found to be "operating" it even though he asserted that he was asleep. If the person in the driver's seat had been awake, he might have been found to have been in such physical control of the car as to support a conclusion that he was operating it even if the car was motionless.
>
> A sleeping person is seldom operating anything. Certainly these sleeping persons were not operating their motionless cars at the time of their arrests. [*Id*. at 446-447.]

In *Wood*, the police discovered the defendant unconscious in his vehicle at a drive-through window of a restaurant. The engine was running, the vehicle was in drive, and the defendant's foot was on the brake. After the police arrested him, they searched his vehicle and discovered marijuana. Relying on *Pomeroy*/*Fulcher*, the trial court suppressed the evidence because the police did not see the defendant committing the misdemeanor offense of OUIL. The Supreme Court summarized the conclusions that it had drawn in the prior cases as follows:

> This Court addressed the definition of "operate" in *Pomeroy* and the companion case, *Fulcher*. We there said that a conscious person in a stationary vehicle might have "actual physical control," and thus operate it. We suggested that no particular state of mind is required to operate a motor vehicle. We also said that a person who is sleeping in a moving vehicle might be found to "operate" it.
>
> But the combination of a stationary vehicle and an unconscious driver in *Pomeroy*/*Fulcher* persuaded the Court that the defendants there were not operating their vehicles when found by the police. [*Wood*, 450 Mich at 403-404.]

After recognizing the difficulty of applying the definition of "operating" when a driver was unconscious, the Court stated:

> We conclude that "operating" should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of an intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk. [*Id*. at 404-405.]

The Court disagreed with and overruled *Pomeroy*/*Fulcher* to a limited degree, explaining:

> The *Pomeroy*/*Fulcher* Court stated that "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping." We read that statement as reflecting an assumption that there was no danger of collision in such a case. The facts of this case show that this assumption was an overgeneralization. *Pomeroy*/*Fulcher* is overruled to the extent it holds, for purposes of construing what conduct is within the meaning of "operate a vehicle," that "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping." [*Id*. at 405.]

Several decisions from this Court have applied *Wood* in the context of sleeping/unconscious drivers discovered inside the motor vehicle, see, e.g., *People v Stephen*, 262 Mich App 213; 685 NW2d 309 (2004); *People v Solmonson*, 261 Mich App 657; 683 NW2d 761 (2004); *People v Burton*, 252 Mich App 130; 651 NW2d 143 (2002), or an intoxicated driver who was standing outside of a parked vehicle, *People v Lyon*, 227 Mich App 599; 577 NW2d 124 (1998). We also very recently applied *Wood* to a conscious driver in *People v Lechleitner*, 291 Mich App 56, 60-61; 804 NW2d 345 (2010), in which an intoxicated driver drove his truck into the freeway's guardrails. The truck came to rest in the middle of the freeway and was inoperable. The defendant was attempting to push the vehicle to the side of

the road when another vehicle swerved to avoid it and crashed into a third vehicle. *Id.* at 58. The defendant argued that he could not "operate" the truck because it was no longer functioning. *Id.* at 61. This Court approved jury instructions based on the reasoning in *Wood* that " '[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.' " *Id.* at 60, quoting *Wood*, 450 Mich at 404-405. We rejected the defendant's contention that *Wood*'s reasoning was outmoded and that a lay dictionary should have been used to define "operation" as "to cause to function." *Lechleitner*, 291 Mich App at 61.

However, we find that *Wood* is inapplicable to this situation involving a conscious (albeit allegedly intoxicated) driver who was sitting inside a stationary vehicle and engaged in operational activity such as starting the engine and changing gears. The *Wood* Court did not purport to nullify or narrow the clear statutory definitions of "operate" and "operator;"[1] rather, the *Wood* Court clarified how the statutory definitions should be applied in a particular context, i.e., when an individual is sleeping or unconscious in a vehicle that is not moving. Neither *Wood* nor *Lechleitner* indicated that the statutory definition of "operate" is inapplicable. Neither decision addressed whether a person who applies the brakes and shifts the gears of a running, yet stationary, vehicle is in "actual physical control" of the vehicle. In this case, defendant was admittedly conscious and alert when she applied the brakes, put the

[1] Much like MCL 257.35a, MCL 257.36 provides: " 'Operator' means every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway."

car in reverse, and then put the car back into park. She was at all times in *actual physical control* of the vehicle. Given a plain reading of MCL 257.35a, we find it unnecessary to determine whether defendant also placed the vehicle in a position posing a significant risk of causing a collision. That inquiry is limited to situations involving a driver who was unconscious or sleeping or, as in *Lechleitner*, whose vehicle was inoperable.

We find further support in our Supreme Court's decision in *Yamat*, which was decided 11 years after *Wood*. In *Yamat*, the Court considered the definition of "operate" in the context of the felonious-driving statute, MCL 257.626c. The defendant was a passenger in a car and grabbed the steering wheel while fighting with his girlfriend, who was driving. When the defendant grabbed the wheel, the car veered off the road and struck a jogger. *Yamat*, 475 Mich at 51. The defendant argued that he did not "operate" the vehicle because he did not have complete control over it. He argued that at most he interfered with his girlfriend's control of the vehicle. Our Supreme Court disagreed, relying on dictionary definitions of particular words in the statutory definition of "operate" set forth in MCL 257.35a. The Court observed that "control" means "power or authority to guide or manage," that "actual" means "existing in act, fact, or reality; real," and that "physical" means "of or pertaining to that which is material." *Id*. at 53-54 & n 15 (citation and quotation marks omitted). Although *Yamat* involved the felonious-driving statute, rather than the OWI statute, both statutes are part of the Michigan Vehicle Code and both statutes use the term "operate." We believe the *Yamat* Court's discussion of the meaning of that term should apply equally to the OWI statute. Defendant applied the brakes of her running vehicle, shifted the vehicle into reverse, and then shifted back into park. Applying the statutory definition of "operate," as construed in accor-

dance with the dictionary definitions set forth in *Yamat*, 475 Mich at 53-54, the evidence indicates that defendant was in "actual physical control" of the vehicle. Thus, she "operated" the vehicle. The fact that it remained stationary is immaterial.

Accordingly, we reverse the circuit court's order and remand this case to the district court for reinstatement of the charge.

Reversed and remanded to the district court. We do not retain jurisdiction.

JANSEN, P.J., and WILDER and K. F. KELLY, JJ., concurred.

PEOPLE v GIOGLIO (ON REMAND)

Docket No. 293629. Submitted October 19, 2011, at Lansing. Decided March 20, 2012, at 9:05 a.m. Remanded for resentencing, 493 Mich 864.

Jeffrey Paul Gioglio was convicted by a jury in the Kalamazoo Circuit Court of two counts of second-degree criminal sexual conduct (CSC-II) and one count of attempted CSC-II. At trial, defense counsel did not cross-examine the child victim and did not present any witnesses or evidence. Gioglio moved for a new trial, arguing that his original defense counsel had provided ineffective assistance. The court, Pamela L. Lightvoet, J., denied the motion, and Gioglio appealed that decision. The Court of Appeals, M. J. KELLY, P.J., and BORRELLO, J. (K. F. KELLY, J., dissenting), determined that defense counsel had failed to subject the prosecutor's case to meaningful adversarial testing, presumed accordingly that Gioglio had suffered prejudice as provided under *United States v Cronic*, 466 US 648, 658-659, 666 (1984), and reversed and remanded the case for a new trial. 292 Mich App 173 (2011). The Supreme Court determined that it was error to presume prejudice under *Cronic* and reversed and remanded the case to the Court of Appeals for consideration of whether defense counsel's performance was ineffective under the test set forth in *Strickland v Washington*, 466 US 668, 687, 691-692 (1984), in addition to consideration of Gioglio's remaining issues on appeal. 490 Mich 868 (2011). The Court of Appeals remanded the case to the trial court for resolution of certain key factual disputes in an unpublished order, entered November 15, 2011 (Docket No. 293629). The trial court resolved the issues.

On remand, the Court of Appeals *held*:

1. The United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, guarantee that every person charged with a crime is entitled to the effective assistance of a lawyer in a criminal proceeding, and a violation of that right occurs under *Strickland* when counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an

objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reviewing court must strongly presume that counsel's conduct falls within the wide range of reasonable professional assistance because there are numerous ways to provide effective assistance in any given case. A trial counsel's acts or omissions fall within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission, there might have been a legitimate strategic reason for it. To prevail, the defendant must demonstrate that there is a reasonable probability that the outcome would have been different in the absence of the deficient performance.

2. Gioglio was not denied the effective assistance of counsel because he failed to establish that any of his counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. Gioglio failed to establish that defense counsel had betrayed his confidential communications to the prosecutor, that defense counsel had, or acted on, a bias against him, or that defense counsel's decision to not cross-examine the complainant fell below an objective standard of reasonableness under prevailing professional norms. The trial court's finding that any statements defense counsel made to the prosecutor related to Gioglio's ability to enter a valid plea was given deference because resolution of the issue involved a matter of credibility. While Gioglio's allegations concerning bias were compelling, the trial court's finding that defense counsel's actions demonstrated no bias toward Gioglio was also entitled to deference as an issue of credibility. The trial court's determination that defense counsel's decision to not cross-examine the minor complainant was part of a reasonable trial strategy was not clearly erroneous. Because the trial court was present throughout the original trial and on remand, it was in a superior position to judge the evidence and the demeanor of the lawyers.

3. Under MCL 769.10, a trial court may enhance the maximum sentence imposed for habitual offenders. A trial court necessarily abuses its discretion if it applies MCL 769.10 and enhances a sentence under the mistaken belief that it is required to do so. However, express approval of a trial court's actions constitutes a waiver that extinguishes any error. Although it was not clear on the record whether the trial court enhanced Gioglio's sentences at a resentencing hearing under the mistaken belief that enhance-

ment was required, Gioglio waived any error when his defense counsel indicated that she was in agreement with the new maximum sentences imposed.

Affirmed.

K. F. KELLY, J., concurred in the result only.

1. CONSTITUTIONAL LAW — RIGHT TO COUNSEL — INEFFECTIVE ASSISTANCE OF COUNSEL.

The United States and Michigan Constitutions guarantee that every person charged with a crime is entitled to the effective assistance of a lawyer in a criminal proceeding, and a violation of that right occurs under the test set forth in *Strickland v Washington*, 466 US 668, 687, 691-692 (1984), when defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result; to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reviewing court must strongly presume that counsel's conduct falls within the wide range of reasonable professional assistance because there are numerous ways to provide effective assistance in any given case; a trial counsel's acts or omissions fall within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission, there might have been a legitimate strategic reason for it; to prevail, the defendant must demonstrate that there is a reasonable probability that the outcome would have been different in the absence of the deficient performance (US Const, Am VI; Const 1963, art 1, § 20).

2. SENTENCES — HABITUAL-OFFENDER SENTENCE ENHANCEMENTS — DISCRETION TO IMPOSE.

Under MCL 769.10, a trial court may enhance the maximum sentence for habitual offenders, but a trial court necessarily abuses its discretion if it applies MCL 769.10 and enhances a sentence under the mistaken belief that it is required to do so.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jeffrey R. Fink*, Prosecuting Attorney, and *Cheri L. Bruinsma*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

ON REMAND

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

M. J. KELLY, P.J. This is the second time that defendant Jeffrey Paul Gioglio's appeal is before this Court. In our prior opinion, the majority examined in detail the evidence and events surrounding Gioglio's trial; for the sake of brevity, we will not restate the facts here. See *People v Gioglio*, 292 Mich App 173, 176-192; 807 NW2d 372 (2011). The majority determined that Gioglio's trial lawyer, Susan Prentice-Sao, did not subject the prosecution's case to meaningful adversarial testing. *Id.* at 201. After concluding that Prentice-Sao had failed in this regard, the majority presumed that Gioglio suffered prejudice as provided under *United States v Cronic*, 466 US 648, 658-659, 666; 104 S Ct 2039; 80 L Ed 2d 657 (1984). *Gioglio*, 292 Mich App at 202. The dissent disagreed with the majority's conclusion that prejudice should be presumed under *Cronic*. Instead, the dissent would have analyzed Gioglio's claim that Prentice-Sao did not provide effective assistance of counsel under the test stated in *Strickland v Washington*, 466 US 668, 687, 691-692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Gioglio*, 292 Mich App at 236-237 (K. F. KELLY, J., dissenting). Our Supreme Court agreed with the dissent and determined that it was error to presume prejudice under *Cronic*. See *People v Gioglio*, 490 Mich 868 (2011). Accordingly, it remanded the case back to this Court "for consideration of whether defense counsel's performance was ineffective under *Strickland*" in addition to consideration of Gioglio's remaining issue on appeal. *Id.*

After our Supreme Court remanded the case to this Court, we determined that before we could properly analyze Gioglio's claims under the test stated in *Strickland*, it would be necessary to remand this case back to the trial court for resolution of certain key factual disputes. See *People v Gioglio*, unpublished order of the Court of Appeals, entered November 15, 2011 (Docket No. 293629). In an opinion and order entered on January 11, 2012, the trial court resolved those factual disputes.

We now consider Gioglio's claim that he did not receive the effective assistance of counsel that is guaranteed to all criminal defendants. For the reasons more fully explained below, we conclude that Gioglio failed to establish that any specific act or omission by Prentice-Sao amounted to the ineffective assistance of counsel. Accordingly, he is not entitled to a new trial on that basis. Further, because there were no other errors warranting relief, we affirm.

I. THE SCOPE OF OUR REVIEW

In our order remanding this matter to the trial court, we ordered the trial court to make "more definite findings on the factual questions identified in [the] order . . . ." *Id*. We identified the factual issues as whether Prentice-Sao actually "told the prosecutor that she believed that her client was guilty," whether she "had a bias against [Gioglio] and acted on that bias," and whether she "expressed enthusiasm for [Gioglio's] lengthy sentence." *Id.* We also noted in passing that the trial court "did not address a series of other actions that [Prentice-Sao] took or might have failed to take." *Id.* We then cited, by way of example, footnote 7 of the majority opinion. *Id.*, citing *Gioglio*, 292 Mich App at 202 n 7. Although we did not specifically direct the trial court to

address the acts and omissions identified in footnote 7, the prosecution argues in its supplemental brief that it was "appropriate" for the trial court to choose not to address those issues. Specifically, the prosecution maintains that the issues identified in footnote 7 were not properly raised in Gioglio's original motion for a hearing on his claim of ineffective assistance of counsel and, therefore, the trial court did not have to address them. For the same reason, the prosecution argues that this Court should limit its analysis to those claims that Gioglio properly raised in his original appeal.

This Court is an error-correcting court that has broad authority to take corrective action with regard to lower court proceedings. See *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002); see also *Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 168; 533 NW2d 339 (1995) ("We are also mindful that this Court functions as a court of review that is principally charged with the duty of correcting errors."). We have the power to "exercise any or all of the powers of amendment of the trial court or tribunal," to "permit amendment or additions to the grounds for appeal," and to "permit amendments, corrections, or additions to the transcript or record." MCR 7.216(A)(1), (3), and (4). This Court also has the power to "enter *any judgment* or *order* or grant further or different relief as the case may require," MCR 7.216(A)(7) (emphasis added), and we may enforce our orders through our contempt power, see *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14; 413 NW2d 392 (1987). Therefore, this Court has the authority to order the trial court to make findings and address issues that were not raised in the original motion for an evidentiary hearing.

In addition, although we will not normally consider issues that the trial court did not have the opportunity to address, this Court can—and will—overlook preser-

vation requirements if it is in the interests of justice to do so. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Indeed, this Court may even raise and address issues sua sponte. See *City of Dearborn v Bacila*, 353 Mich 99, 118, 90 NW2d 863 (1958) (recognizing that there "is no hard and fast rule that appellate courts, sitting either in law or equity, cannot and, hence, do not raise and decide important questions *sua sponte*"); see also *People v Yost*, 278 Mich App 341, 388; 749 NW2d 753 (2008) (addressing an issue sua sponte because the Court was convinced that the trial court committed plain error and that it was likely to repeat the error on remand). Accordingly, the fact that Gioglio might not have raised a particular issue before the trial court, while certainly relevant to this Court's resolution of a claim of error, does not necessarily preclude this Court from granting relief. It is for this Court alone to determine whether and to what extent an issue was improperly preserved, waived, or otherwise ineligible for appellate relief on procedural grounds. And, as we are bound to follow the dictates of our Supreme Court's orders, the trial court was bound to follow the dictates of this Court's order "in the utmost good faith." See *Werkhoven v City of Grandville (On Remand)*, 65 Mich App 741, 744; 238 NW2d 392 (1975); see also *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959) ("The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court."). Thus, contrary to the prosecution's claims, the trial court was not free to disregard our order on the basis of a belief that an issue addressed by our order was not properly raised. Nevertheless, as we have already recognized, we did not specifically order the trial court to address the issues identified in footnote 7; rather, we cited that footnote in

passing and in the general context of the need for a remand. And we are satisfied that the trial court made a good-faith effort to comply with our order on remand. *Werkhoven*, 65 Mich App at 744.

Moreover, the prosecution's fear that we might address the issues that were identified in footnote 7 is unfounded. This Court will exercise its ability to address unpreserved issues only in the most exceptional circumstances. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993); see also *Bacila*, 353 Mich at 118 (recognizing that appellate courts have the power to address unpreserved issues, but stating that the "power is exercised sparingly" and with full realization of the restrictions and limitations inherent in the power's employment). In our prior opinions, both the majority and the dissent recognized that Gioglio had not properly raised those issues and, accordingly, that those errors could not serve as a basis for granting relief. See *Gioglio*, 292 Mich App at 202-203 & n 7 (M. J. KELLY, P.J.); *id.* at 224 n 3 (K. F. KELLY, J., dissenting). As such, we shall limit our analysis of Gioglio's claim of ineffective assistance to those acts and omissions that he arguably raised in his original brief on appeal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARDS OF REVIEW

Whether a defendant's trial counsel was ineffective is not a matter of historical fact; rather, both the performance and prejudice components of the ineffectiveness inquiry involve mixed questions of fact and law. *Strickland*, 466 US at 698. This Court reviews de novo, as a question of constitutional law, the determination that a particular act or omission fell below an objective stan-

dard of reasonableness under prevailing professional norms and prejudiced the defendant's trial. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008) (noting that appellate courts review the facts underlying a trial court's decision on a claim of ineffective assistance of counsel for clear error, but review de novo, as a question of constitutional law, the trial court's determination that the conduct amounted to ineffective assistance); see also *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473, 1486; 176 L Ed 2d 284 (2010) (holding that as a matter of law the failure to correctly advise a client about the possibility that the client will be deported if he or she pleads guilty to a particular charge falls below an objective standard of reasonableness under prevailing professional norms). When there has been no hearing on the defendant's ineffective-assistance claims,[1] there are no findings to which this Court must defer; as such, this Court will determine whether the performance of defendant's trial counsel amounted to the ineffective assistance of counsel by examining the lower court record alone. See *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003) (stating that when there has been no hearing below, the appellate court's review is limited to mistakes that are apparent on the record). However, when, as here, the trial court has conducted a *Ginther* hearing to resolve factual disputes concerning the conduct of the lower court proceedings, this Court will review the trial court's findings for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The clear-error standard is highly deferential; an appellate court will only determine that a trial court's finding is clearly erroneous when, after a

[1] Michigan courts typically refer to hearings on a claim of ineffective assistance of counsel as *Ginther* hearings after our Supreme Court's decision in *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

review of the entire record, it is left with the definite and firm conviction that the trial court has made a mistake. *People v McSwain*, 259 Mich App 654, 682-683; 676 NW2d 236 (2003).

B. THE TEST UNDER *STRICKLAND*

The United States and Michigan Constitutions both guarantee that every person charged with a crime will have a lawyer's assistance throughout the criminal proceedings. US Const, Am VI; Const 1963, art 1, § 20. Indeed, the right to have the assistance of a lawyer is so fundamental to the integrity of our system that the state must provide the accused with a lawyer if the accused cannot afford to hire his or her own lawyer. See *Gideon v Wainwright*, 372 US 335, 344; 83 S Ct 792; 9 L Ed 2d 799 (1963). But the mere appointment of a lawyer to assist the accused is not enough to satisfy the Sixth Amendment right; the right necessarily includes the right to have assistance that is within the range of competence demanded of lawyers in criminal cases. *Cronic*, 466 US at 654-655. As such, the Sixth Amendment right to have the assistance of a lawyer in a criminal proceeding includes the right to have effective assistance. *Strickland*, 466 US at 686. And it is a violation of the right to have the assistance of counsel when a criminal defendant's trial lawyer does not render adequate legal assistance. *Id.*

In the majority of situations, Michigan courts apply the test stated under *Strickland* when evaluating a defendant's claim that his or her trial lawyer did not provide effective assistance. See *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The *Strickland* test recognizes that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 US at 686. To establish a claim of ineffective assistance of counsel, the defendant must show that "counsel's representation fell below an objective standard of reasonableness" under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

The first prong of this test requires the defendant to identify those acts or omissions of counsel that the defendant alleges were not the result of reasonable professional judgment. *Id.* at 690. The reviewing court must then determine whether "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* Because there are countless ways to provide effective assistance in any given case, in reviewing a claim that counsel was ineffective courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to "affirmatively entertain the range of possible" reasons that counsel may have had for proceeding as he or she did. *Cullen v Pinholster*, 563 US ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011). That inquiry is objective; although the reviewing court may not engage in a post hoc rationalization of the counsel's decision-making that contradicts the available evidence, neither may courts insist that counsel confirm every aspect of the strategic basis for his or her actions. *Harrington v Richter*, 562 US ___; 131 S Ct 770, 790; 178 L Ed 2d 624 (2011). Accordingly, a reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the

range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission. *Pinholster*, 563 US at ___; 131 S Ct at 1407; see, e.g., *People v Vaughn*, 291 Mich App 183, 197; 804 NW2d 764 (2010) (explaining that there were several valid reasons why the defendant's trial counsel might not have objected to the trial court's decision to close the courtroom during jury voir dire and concluding on that basis that the defendant had failed to overcome the presumption that his trial counsel's decision was a matter of sound trial strategy).

The second prong of the test requires the defendant to show prejudice. *Strickland*, 466 US at 692. Under this prong, it is not enough that the defendant showed that the act or omission "had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the defendant must show that "there is a reasonable probability" that the outcome would have been different in the absence of the deficient performance. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Further, this determination must be made in consideration of the "totality of the evidence" presented to the jury and keeping in mind that some "errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695-696.

C. APPLICATION OF *STRICKLAND*

Having explained the test applicable to claims of ineffective assistance of counsel, we shall now examine

the instances that Gioglio alleges amounted to ineffective assistance by Prentice-Sao. Although Gioglio argued that he did not receive the effective assistance of counsel under the test stated in S*trickland*, he did not separately identify or analyze the acts or omissions that he alleges to have been deficient. Instead, he merely cited the conduct that he identified in his analysis of his claim under *Cronic*. Therefore, we shall limit our review to those acts and omissions.

1. BETRAYAL OF ATTORNEY-CLIENT PRIVILEGE

Gioglio argued that Prentice-Sao betrayed his attorney-client communications by telling the prosecutor that he had admitted to committing the charged conduct. We agree that a trial lawyer's decision to betray his or her client's confidential communications to the prosecutor would normally fall below an objective standard of reasonableness under prevailing professional norms. See MRPC 1.6. However, after this Court's remand, the trial court found that Prentice-Sao did not intentionally disclose any privileged communications to the prosecutor. Rather, the trial court found that the conversations did not amount to a betrayal of confidence, but appeared "to be related to plea negotiations." Thus, the trial court implicitly accepted Prentice-Sao's version of events; namely, that any statements she had made to the prosecutor were proper and related to Gioglio's ability to enter a valid plea. Because resolution of this factual dispute was a matter of credibility, we will defer to the trial court's superior ability to judge such matters. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); MCR 2.613(C). Accordingly, given the trial court's findings, we must conclude that Gioglio has failed to establish the factual predicate of his claim—that is, he failed

to establish that Prentice-Sao actually betrayed his confidential communications to the prosecutor. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (stating that the defendant bears the burden of establishing the factual predicate for his claim of ineffective assistance).

2. BIAS

Gioglio also argued on appeal that Prentice-Sao had a bias against him and that the bias amounted to an actual conflict of interest under *Mickens v Taylor*, 535 US 162, 172-173, 172 n 5; 122 S Ct 1237; 152 L Ed 2d 291 (2002). Specifically, Gioglio stated that the evidence that Prentice-Sao mimicked his speech impediment, that she said she could not stand to look at him and that he made her sick, and that she expressed pleasure after he received a lengthy sentence demonstrated that Prentice-Sao had a bias against him and that her bias adversely affected her performance.

Gioglio presented compelling evidence that Prentice-Sao might have had a bias against him and acted on that bias to his detriment. And we agree that when a trial lawyer adopts the view that his client is guilty and acts on that belief, the acts taken on the basis of the bias necessarily fall below an objective standard of reasonableness under prevailing professional norms. See *Gioglio*, 292 Mich App at 205, citing *United States v Swanson*, 943 F2d 1070, 1074 (CA 9, 1991). Nevertheless, the trial court did not agree that the evidence established that Prentice-Sao "had a bias against her client and acted on that bias." The court explained that Prentice-Sao's "actions during the case and her testimony are not consistent with the allegations that her actions were affected by any bias." The trial court implicitly found Prentice-Sao's testimony that she "was

concerned about [Gioglio's] well-being throughout the case" to be credible and found that Prentice-Sao "seemed to be doing what she could to protect [Gioglio]." Again, because the trial court was in the best position to evaluate the demeanor and credibility of the witnesses, we must defer to the trial court's finding that Prentice-Sao did not have, or act on, a bias against Gioglio. *Sexton*, 461 Mich at 752. Accordingly, Gioglio has not established this claim of error.

3. FAILURE TO CROSS-EXAMINE

Gioglio also argues that Prentice-Sao's decision to not cross-examine the complainant fell below an objective standard of reasonableness under prevailing professional norms. He maintains that Prentice-Sao's decision was not motivated by trial strategy, but by her inability to question a child victim of sexual abuse and her contempt for him.

We can imagine numerous valid reasons why a competent lawyer—when confronted with the facts of this case—might refrain from cross-examining the complainant as a matter of trial strategy; a reasonably competent lawyer might want to avoid the appearance of bullying the witness, might believe that the complainant's testimony can best be undermined by pointing out inconsistencies with other testimony, and might want to avoid elaboration on damaging points of testimony. See, e.g., *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997) (noting that a trial lawyer's handling of witnesses is presumptively a matter of trial strategy). As such, in the absence of evidence to the contrary, we would normally presume that Prentice-Sao's decision was founded on considerations of reasonable professional judgment and end the inquiry there. See *Pinholster*, 563 US at ___; 131 S Ct at 1407

(requiring reviewing courts to affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did); *Strickland*, 466 US at 689-690 (providing that reviewing courts must recognize that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). However, Gioglio presented evidence that tended to show that Prentice-Sao might have refused to cross-examine the complainant because she simply could not bring herself to do so or because she believed that her client was guilty and, for that reason, decided that it would be inappropriate to put the child through a cross-examination. If Prentice-Sao refused to cross-examine the complainant for those reasons, the decision could not be said to have been objectively reasonable under prevailing professional norms. See *Strickland*, 466 US at 688 (stating that a lawyer has a duty of loyalty to his or her client and must "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process").

In examining Gioglio's evidence, the trial court stated that it was "not convinced that [Prentice-Sao] refused to cross-examine the victim because she believed that her client was guilty or because she believed that the victim did not deserve to be put through a cross-examination." The trial court also summarized Prentice-Sao's testimony from the hearing and implicitly found that Prentice-Sao's version was credible. It then found that Prentice-Sao made the decision as part of a "reasonable trial strategy." Although we might disagree with these findings, mere disagreement is not a sufficient basis for determining that they are clearly erroneous. See *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999) (stating that a finding is not clearly erroneous if there is sufficient support for the

finding in the record and concluding that the Court of Appeals overstepped its review function by substituting its judgment regarding the evidence for that of the trial court). The trial court was present throughout the original trial and observed the trial lawyers. It also had the opportunity to observe the lawyers' demeanor at the *Ginther* hearing. It was, therefore, in a superior position to judge the evidence and we will defer to its judgment. *Id.* at 209; MCR 2.613(C). On this record, Gioglio has failed to establish that Prentice-Sao's decision to not cross-examine the complainant fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 US at 688.

D. CONCLUSION

When Gioglio's claims of ineffective assistance are viewed in light of the trial court's resolution of the competing factual claims, we must conclude that Gioglio has not established that any of Prentice-Sao's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. Consequently, he has not established that he did not receive the effective assistance of counsel under the test stated in *Strickland*. See *id.*

III. HABITUAL-OFFENDER ENHANCEMENT

A. STANDARDS OF REVIEW

Finally, as part of his original appeal, Gioglio argued that the trial court erred when it determined that it had to sentence him as an habitual offender under MCL 769.10. This Court reviews for an abuse of discretion a trial court's decision to apply habitual-offender enhancements. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

B. ANALYSIS

The trial court originally sentenced Gioglio using the maximum sentences without any habitual-offender enhancements. The trial court later held a new hearing to correct the maximum sentences. The trial court indicated that it gave Gioglio "the wrong maximum" and then resentenced him by increasing the maximum sentences for each conviction by 1½, as provided under MCL 769.10.

Under MCL 769.10, a trial court may—but is not required to—enhance the maximum sentences for habitual offenders. *People v Bonilla-Machado*, 489 Mich 412, 429; 803 NW2d 217 (2011). And if a trial court applies MCL 769.10 to enhance a sentence under the mistaken belief that it is required to do so, it necessarily abuses its discretion. *Id.* at 430. In this case, it is not entirely clear that the trial court enhanced Gioglio's maximum sentences under a mistaken belief that it had to apply MCL 769.10. In any event, we conclude that Gioglio waived this claim of error. After the trial court applied MCL 769.10 to Gioglio's maximum sentences, it asked if "everyone was in agreement" with the new maximums, to which Prentice-Sao replied that she was. By affirmatively agreeing with the trial court's decision to apply MCL 769.10 to enhance Gioglio's sentences, Prentice-Sao waived any claim that the trial court erred by doing so on behalf of her client. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (holding that express approval of the trial court's actions constitutes a waiver that extinguishes any error).

IV. GENERAL CONCLUSION

Gioglio failed to establish that he did not receive the effective assistance of counsel under the test stated in

Strickland. Further, his trial lawyer waived any claim that the trial court did not properly exercise its discretion when applying MCL 769.10 to enhance his sentences. Therefore, we conclude that there were no errors warranting appellate relief.

Affirmed.

BORRELLO, J., concurred with M. J. KELLY, P.J.

K. F. KELLY, J. (*concurring*). I concur in the result only.

In re BRADLEY ESTATE

Docket No. 299640. Submitted January 5, 2012, at Grand Rapids. Decided March 22, 2012, at 9:00 a.m. Leave to appeal granted, 493 Mich 866.

Nancy Mick, as personal representative of the estate of Stephen Bradley, filed a contempt of court action in the Kent County Probate Court against the Kent County Sheriff's Department. Mick had obtained an order from the probate court on August 12, 2003, requiring that her brother, Bradley, be taken into custody for a psychiatric evaluation. The sheriff's department failed to execute the pick-up order, and Bradley fatally shot himself on August 21, 2004. Mick originally filed a wrongful-death action against the sheriff's department in the Kent Circuit Court, which the circuit court summarily dismissed on the basis of governmental immunity, MCL 691.1407. Mick then filed this civil-contempt petition in the probate court, claiming that the sheriff's department had failed to execute the probate court's order and that she suffered damages including but not limited to the damages set forth in the wrongful-death statute, MCL 600.2922. The sheriff's department moved for summary disposition, arguing that under MCL 691.1407, it was immune from the damages claim because Mick was essentially asking for tort damages from which it was immune. The probate court, David M. Murkowski, J., denied the motion, and the sheriff's department appealed that decision in the circuit court, which reversed. The circuit court, James R. Redford, J., concluded that Mick's claim for compensatory damages was barred by the government tort liability act (GTLA), MCL 691.1401 *et seq*., because the underlying cause of action was based in tort. The circuit court remanded the case to the probate court for entry of summary disposition in favor of the sheriff's department. Mick appealed by leave granted.

The Court of Appeals *held*:

Compensatory damages for contempt may be awarded under MCL 600.1721. The damages that may be awarded for contempt of court that results in a loss of life may be assessed pursuant to the wrongful-death statute. Under the GTLA, a governmental agency is immune from tort liability for all civil wrongs if the governmental agency is engaged in the exercise or discharge of a governmen-

tal function. However, § 7 of GTLA, MCL 691.1407, does not bar recovery if a plaintiff successfully pleads and establishes a nontort cause of action even though the underlying facts could have also established a tort cause of action. The circuit court erred by concluding that Mick's claim was barred by the GTLA on the basis that the underlying cause of action was premised on the wrongful-death statute and therefore based in tort. A contempt action can survive a governmental immunity challenge if the cause of action is separate and distinct from the wrongful-death action grounded in tort liability. The nature and type of damages sought are irrelevant for determining whether the actual claim was barred by governmental immunity. Accordingly, tort-like damages would be recoverable in a contempt action if the underlying claim is proved.

Reversed and remanded to the probate court.

CONTEMPT — GOVERNMENTAL IMMUNITY — RECOVERY OF DAMAGES — NONTORT CAUSES OF ACTION.

Under the government tort liability act, MCL 691.1401, *et seq*., a governmental agency is immune from tort liability for all civil wrongs if the governmental agency is engaged in the exercise or discharge of a governmental function; however, MCL 691.1407 does not bar recovery if a plaintiff successfully pleads and establishes a nontort cause of action such as an action for contempt, even though the underlying facts could have also established a tort cause of action; the cause of action must be separate and distinct from the action grounded in tort liability.

Timothy L. Taylor for Nancy Mick.

Varnum LLP (by *Peter A. Smit, Timothy E. Eagle,* and *Adam J. Brody*), for the Kent County Sheriff's Department.

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM. In this contempt action, petitioner Nancy Mick, in her capacity as personal representative of the estate of Stephen Bradley, appeals by leave granted the circuit court order reversing a probate court order denying the motion of respondent Kent County Sheriff's Department (KCSD) for summary disposition of Mick's claim for compensatory damages

for the death of her brother, Stephen Bradley. The only issue on which leave was granted is whether the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., applies to bar recovery of compensatory contempt damages sought pursuant to MCL 600.1721. Because we conclude that the GTLA does not apply, we reverse.

On August 12, 2004, Mick obtained an order from the probate court requiring that Bradley be taken into custody for a psychiatric evaluation. KCSD failed to execute this pick-up order in the days following its issuance, and on August 21, 2004, Bradley fatally shot himself. Mick requested that KCSD conduct an internal investigation into its failure to execute the pick-up order. That investigation determined that KCSD's handling of the pick-up order was negligent. Mick filed a wrongful-death action against KCSD, alleging that its negligence and breach of duty caused Bradley's death; however, that action was summarily dismissed by the circuit court on the basis of governmental immunity because Mick could not establish gross negligence or that KCSD's negligence was "the" proximate cause of Bradley's death.

After her wrongful-death action was dismissed, Mick filed a petition in the probate court alleging civil contempt. The petition asserted that KCSD failed and refused to execute the probate court order and as a result of that failure, Mick "suffered and continues to suffer damages, including, but not limited to, all of those damages set forth in the Michigan Wrongful Death Statute, MCL 600.2922, et seq." Mick asked the probate court to enter an order finding KCSD in civil contempt and award her "damages in an amount the Court deems appropriate."

In lieu of filing an answer, KCSD moved for summary disposition pursuant to MCR 2.116(C)(10). It argued

that under § 7 of the GTLA, MCL 691.1407, it was immune from any damages claim because Mick was essentially asking for tort damages, regardless of the fact that her petition was for civil contempt. Mick opposed KCSD's motion and argued that her action was for compensatory damages for KCSD's contempt and that the action was not barred by the GTLA because her request for damages did not stem from a tort action. After hearing oral arguments, the probate court denied KCSD's motion on the basis of its inherent power to punish contempt of court when, as here, there was a violation of a specific court order. The probate court held that "[t]he claim under the contempt statute is not based in tort, but it's based in [sic] violation of a court order" and concluded that "[g]overnmental immunity does not insulate a contemnor from the contemnor's refusal or negligence to obey a court order."[1]

KCSD appealed the probate court's ruling in the circuit court, which concluded that Mick's claim for

[1] In its motion for summary disposition in the probate court, KCSD also argued that Mick's petition was procedurally defective because she did not submit a sworn affidavit as required by MCR 3.606(A) and because KCSD is not a legal entity that can be sued. KCSD further argued that Mick had failed to demonstrate a genuine issue of material fact in regard to willfulness, which was required because Mick had to demonstrate that KCSD willfully disobeyed a court order, and that Mick had also failed to demonstrate a genuine issue of material fact in regard to causation, which was required because MCL 600.1721 requires a showing that any misconduct caused an actual loss or injury. In its decision issued on the record, the probate court did not explicitly address KCSD's arguments regarding willfulness or causation. However, because it denied KCSD's summary disposition motion, it must have implicitly determined that Mick had demonstrated a genuine issue of material fact. In its ruling, the probate court discussed only its inherent power to punish for contempt and its conclusion that the action is not barred by the GTLA. It briefly mentioned Mick's failure to file a sworn affidavit and stated that the defect did not bar the action because it was clear that KCSD had notice. It did not mention KCSD's argument that KCSD is not a legal entity capable of being sued.

compensatory damages for Bradley's death was barred by the GTLA. At the hearing on KCSD's appeal from the probate court, the circuit court noted that "[t]he power to punish contempt is an inherent common law right of Michigan courts of record," and as such, "contempt is not based in tort." The circuit court held that "the GTLA does not prevent courts from punishing, by either fine or jail time, government actors found to be in contempt." Nevertheless, the circuit court concluded that "the power to award compensatory damages is not an inherent contempt power of the court. Rather compensatory damages in contempt proceedings are awarded pursuant to MCL 600.1721." The circuit court noted that "the underlying cause of action is based in tort," as evidenced by the fact that the case was originally brought under the wrongful-death statute. The circuit court concluded, "Because the damages arise from tortious conduct that is not an exception to GTLA immunity, the GTLA bars [Mick] from recovery of compensatory damages from [KCSD] in the present contempt proceeding." The circuit court reversed the probate court's denial of KCSD's motion for summary disposition and remanded with direction that the probate court enter an order granting KCSD's motion pursuant to MCR 2.116(C)(7).[2]

Mick appealed the circuit court's order dismissing Mick's claim against KCSD for contempt damages on the basis that they are barred by the GTLA, and this

[2] On appeal to the circuit court, KCSD again argued that the GTLA barred Mick's claim for compensatory damages. KCSD also argued that the Legislature can circumscribe the probate court's authority to award compensatory damages for contempt, that Mick cannot demonstrate willfulness, and that there is no genuine issue of material fact regarding causation. Because the circuit court concluded that Mick's claims for compensatory damages are barred by the GTLA, it did not address the other issues raised by KCSD.

Court granted leave, limited to the issue raised in the application. MCR 7.205(D)(4). Accordingly, the only issue before us is whether the circuit court erred by deciding that the GTLA immunizes governmental actors from contempt-based compensatory damages awarded under MCL 600.1721.

We review de novo a trial court's decision on a motion for summary disposition. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of immunity granted by law. A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence as long as the evidence would be admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The allegations set forth in the complaint must be accepted as true unless contradicted by other evidence. *Id.* "[T]he trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman*, 290 Mich App at 39.

Issues of statutory interpretation are also questions of law that we review de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Id.* at 246-247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247.

MCL 600.1721 provides:

> If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the

> defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

The GTLA provides in pertinent part that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). In *Tate v Grand Rapids*, 256 Mich App 656, 660; 671 NW2d 84 (2003), this Court explained that "[t]he GTLA unambiguously grants immunity from *all* tort liability, i.e., all civil wrongs for which legal responsibility is recognized, regardless of how the legal responsibility is determined, except as otherwise provided in the GTLA."

In this case, KCSD does not dispute that the compensatory damages that may be awarded pursuant to MCL 600.1721 for contemptuous conduct that results in a loss of life could be assessed pursuant to the wrongful-death statute, MCL 600.2922, as requested by Mick in her petition filed in the probate court. Rather, KCSD argues that the wrongful-death damages sought by Mick in this case pursuant to MCL 600.1721 would actually be tort liability damages that are barred by the GTLA. Relying on the language of the governmental immunity statute and the broad application of the GTLA set forth in *Tate*, KCSD argues that regardless of how Mick's claim against it is stated, because the facts giving rise to the damages could also establish a tort cause of action, the damages are barred by the GTLA. We disagree.

In *Tate*, this Court addressed whether the GTLA applied to bar a claim against a governmental entity when the claim was based on a statute that imposed strict liability for dog bites. *Tate*, 256 Mich App at 657. After stating that the GTLA applies to "all civil

wrongs," this Court concluded that strict-liability claims are within the ambit of tort law, just as are other tort-related claims such as products liability and premises liability. *Id.* at 660-661. Thus, the holding in *Tate* was based on the conclusion that the strict-liability dog-bite claim asserted by the plaintiff was a claim for tort liability that was barred by the GTLA. The nature of the damages being sought by the plaintiff played no role in this Court's analysis.

Similarly, in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647; 363 NW2d 641 (1984), our Supreme Court addressed whether a contract action was subject to dismissal pursuant to the GTLA because the contract claim was joined with a tort claim and tort damages were sought for both. The Court rejected the governmental agency's argument that the plaintiff's contract claim should be dismissed even though the plaintiff had merely restated allegations contained in its tort claim that was barred by governmental immunity and requested the same damages. *Id.* at 647-648. In so holding, the Court stated:

> We recognize that plaintiffs have and will attempt to avoid § 7 [MCL 691.1407] of the governmental immunity act by basing their causes of action on theories other than tort. Trial and appellate courts are routinely faced with the task of determining whether the essential elements of a particular cause of action have been properly pleaded and proved. If a plaintiff successfully pleads and establishes a non-tort cause of action, § 7 will not bar recovery simply because the underlying facts could have also established a tort cause of action. [*Id.*]

Consistent with the holdings in *Tate* and *Ross*, whether Mick's contempt claim can survive a governmental immunity challenge is controlled not by the nature of the damages sought, but by whether Mick's

contempt action is a cause of action that is separate and distinct from one that is grounded in tort liability.

In this case, there is no doubt that Mick's contempt action is an attempt to avoid application of the GTLA. Indeed, Mick initially brought a tort action that was summarily dismissed because it was barred by the GTLA; however, Mick recast her complaint as one for contempt. In accord with the *Ross* Court's holding that the GTLA will not bar recovery simply because the underlying facts could have also established a tort cause of action, we conclude that tort-like damages are recoverable in a contempt action assuming contempt can be proved. Thus, whether the GTLA implicates the viability of Mick's contempt action rests on whether Mick can successfully plead and establish a contempt cause of action. *Id.* The nature of the damages being requested has no role in determining whether the action is barred by the GTLA. Consequently, the circuit court erred when it dismissed this case merely because the damages sought were similar to tort damages.

Reversed and remanded to the probate court for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ., concurred.

SZYSZLO v AKOWITZ

Docket No. 299570. Submitted December 13, 2011, at Detroit. Decided March 22, 2012, at 9:05 a.m. Leave to appeal denied, 492 Mich 857.

Joseph Szyszlo filed a medical malpractice action in the Oakland Circuit Court against Leigh Akowitz, A. Heinrich, Mable Alverson, Trinity Health-Michigan, doing business as St. Joseph Mercy Hospital, Trinity-Health Michigan, doing business as St. Joseph Mercy Hospital Pontiac, Joffer Hussein Hakim, M.D., and Bloomfield Anesthesia, P.C. Szyszlo filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Michigan on July 10, 2006, approximately three months after a surgery from which the medical malpractice allegations arose. In September 2006, Szyszlo amended the bankruptcy petition to add the personal-injury claim arising out of the alleged medical malpractice as an asset. Szyszlo listed the current market value of the claim as $15,000, and then on a separate form claimed maximum exemption of $18,450 against the claim for personal injury due to medical malpractice, with the value of the claim listed as unknown. Neither the trustee nor any creditor filed an objection to this exemption. On April 15, 2008, the bankruptcy trustee filed a report of no distribution in which she indicated there was no property available for distribution from the estate other than the exemptions claimed under the exemption law. She requested to be discharged from her duties as trustee. Szyszlo filed the instant medical malpractice claim on October 3, 2008, but the bankruptcy case was not closed by the bankruptcy court, and the trustee discharged, until May 13, 2009. Defendants thereafter filed separate motions for summary disposition arguing that Szyszlo lacked the legal capacity to assert the medical malpractice claim and that he should be judicially estopped from claiming damages in excess of $15,000. The circuit court, Edward Sosnick, J., granted defendants' motion concluding that Szyszlo lacked the legal capacity to sue on the claim because at the time the complaint was filed the bankruptcy estate was not closed. The circuit court reasoned that the bankruptcy estate retained its interest in the potential malpractice lawsuit until the estate was closed on May 13, 2009. Szyszlo appealed and defendants cross-appealed.

The Court of Appeals *held*:

1. Under 11 USC 522(d)(11)(D), a debtor may claim an exemption from inclusion in the bankruptcy estate for a payment on account of personal bodily injury. Unless a party in interest objects, the property claimed as exempt on a list is exempt. 11 USC 522(l). A trustee does not have to abandon the property as a prerequisite to the debtor claiming the exemption. Rather, abandonment is the method used by a trustee to relieve the estate of any property that is burdensome to the estate and that is of inconsequential value and benefit to the estate. However until and unless the trustee abandons the estate's interest in the lawsuit, any amounts recovered in the lawsuit above the amount of the statutory exemption would flow to the bankruptcy estate. A debtor still retains an interest in the lawsuit because the statutory exemption represents a present, substantial interest and provides the necessary standing to pursue the action. The circuit court erred by granting defendants' motion for summary disposition on the basis of lack of legal capacity to sue. Szyszlo had standing and was a proper party to bring this suit because he had an undisputed exemption for the medical malpractice claim. Szyszlo would also be entitled to any funds recovered in the medical malpractice suit that are in excess of the sum of administrative fees, exemptions and the debt owed by the estate.

2. Judicial estoppel applies when a party successfully and unequivocally asserts a position in a prior proceeding that is wholly inconsistent with the position taken in a subsequent proceeding. The circuit court properly concluded that Szyszlo was not estopped from bringing this medical malpractice action. The $15,000 amount he claimed as the market value of his medical malpractice claim was not inconsistent with the circuit court's jurisdictional limit amount of $25,000. The potential claim was listed as an asset in the bankruptcy filing in 2006 and proceedings were not begun in this case until nearly two years later. The market value of potential damages in a suit that had not yet been filed was discounted by the uncertainties associated with such a trial. It was appropriate for the market value to be claimed as $15,000, while the damages sought were in excess of $25,000. The listed $15,000 market value of the claim was not a statement of actual damages and was not an "unequivocal" statement of such damages. Szyszlo was accordingly not judicially estopped from seeking damages in excess of $25,000 in the medical malpractice claim.

3. Circuit courts have jurisdiction over cases in which $25,000 or more is in controversy. MCL 600.8301(1). The amount in controversy is based on the damages claimed. Under the version of

11 USC 522(11)(D) in effect in 2006, $18,450 was the maximum statutory exemption permitted in a personal bankruptcy petition. The circuit court had jurisdiction over Szyszlo's medical malpractice claim. If he recovered damages, Szyszlo would be entitled to the $18,450 as his exemption, plus any amount in excess of the amount necessary to satisfy his debts in the bankruptcy estate. Contrary to defendants' argument, the potential for recovering in excess of the $25,000 jurisdictional amount was sufficient to confer jurisdiction on the circuit court.

Reversed and remanded.

1. ACTIONS — STANDING IN BANKRUPTCY ACTIONS — STATUTORY EXEMPTIONS FROM INCLUSION IN BANKRUPTCY ESTATE — POTENTIAL LAWSUITS — PRESENT AND SUBSTANTIAL INTEREST.

Under 11 USC 522(d)(11)(D), a debtor may claim an exemption from inclusion in a bankruptcy estate for a payment on account of personal bodily injury; unless a party in interest objects, the property claimed as exempt on a list is exempt under 11 USC 522(*l*); a trustee does not have to abandon the property as a prerequisite to the debtor claiming the exemption; rather, abandonment is the method used by a trustee to relieve the estate of any property that is burdensome to the estate and that is of inconsequential value and benefit to the estate; however until and unless the trustee abandons the estate's interest in the lawsuit, any amounts recovered in the lawsuit above the amount of the statutory exemption would flow to the bankruptcy estate; a debtor still retains an interest in the lawsuit because the statutory exemption represents a present, substantial interest and provides the necessary standing to pursue the action.

2. ESTOPPEL — JUDICIAL ESTOPPEL — INCONSISTENT POSITION IN PRIOR PROCEEDING.

Judicial estoppel applies when a party successfully and unequivocally asserts a position in a prior proceeding that is wholly inconsistent with the position taken in a subsequent proceeding.

Frederic M. Rosen, P.C. (by *Frederic M. Rosen* and *Steffani Chocron*), and *Bendure & Thomas* (by *Mark R. Bendure*) for Joseph Szyszlo.

Lipson, Neilson, Cole, Seltzer & Garin, P.C. (by *Karen A. Smyth* and *Mark E. Phillips*), for Leigh Akowitz.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *Linda M. Garbarino* and *David R. Nauts*), for A. Heinrich, Mable Alverson, and Trinity Health-Michigan.

Saurbier & Siegan, P.C. (by *Marc D. Saurbier*), for Joffer Hussein Hakim, M.D., and Bloomfield Anesthesia, P.C.

Before: SHAPIRO, P.J., and WHITBECK and MURRAY, JJ.

PER CURIAM. Plaintiff appeals from the trial court's order granting defendants' motions for summary disposition and dismissing plaintiff's medical malpractice suit. The trial court found that at the time plaintiff filed suit, the sole party having an interest in the medical malpractice claim was the trustee of plaintiff's bankruptcy estate. Given this finding, the trial court held that plaintiff lacked the legal capacity to sue on the claim. Plaintiff appeals as of right. Defendants cross-appeal as of right, asserting that the trial court erred by rejecting their alternative argument that plaintiff, even if a proper party in interest, was judicially estopped from seeking damages in excess of $15,000, an amount less than the minimum required for circuit court jurisdiction. For the reasons set forth below, we reverse the trial court's conclusion that plaintiff was not a proper party in interest and affirm the trial court's conclusion that plaintiff was not judicially estopped from seeking damages in excess of the circuit court jurisdictional minimum. Accordingly, we reverse the order of summary disposition and remand for further proceedings.

I. BACKGROUND

Plaintiff underwent a 10-hour surgery after sustaining multiple orthopedic injuries in a fall on April 11,

2006. Following the surgery plaintiff was found to be cortically blind.[1] The hospital discharge summary reported that "the blindness was not present prior to the operative intervention and the assumption was that it was related to positioning and or hypotension during the procedure." Plaintiff asserts that the defendant anesthesiologist and defendant nurse anesthetists were negligent by failing to properly position and reposition him during the surgery to allow for proper blood flow, and by failing to properly monitor and address his perioperative hypotension. Plaintiff claims that these failures caused his perioperative blindness.[2]

On July 10, 2006, about three months after the surgery, plaintiff filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Michigan. On or about September 6, 2006, the petition was amended to add a potential medical malpractice claim as an asset. Under the heading "other personal property of any kind not already listed," the amended petition listed "claim for personal injury due to medical malpractice, *value unknown*." (Emphasis added.) The bankruptcy form also requested the "current market value of the debtor's interest in property," and this was listed as $15,000. On the portion of the form for the petitioner to list "property claimed as exempt," plaintiff listed a claimed exemption of $18,450[3] against the "claim for personal injury due to

[1] Cortical blindness is a loss of vision resulting from damage to the brain rather than damage to the eye itself. See *Stedman's Medical Dictionary* (26th ed), p 212.

[2] The affidavits of meritorious defense assert that defendants fully complied with the applicable standards of care and that the cause of plaintiff's perioperative vision loss cannot be known to within a reasonable degree of medical certainty.

[3] The maximum statutory exemption amount then permitted under 11 USC 522(11)(D).

medical malpractice, value unknown." Neither the trustee nor any creditor filed an objection to this exemption.

On April 15, 2008, the bankruptcy trustee filed a report of no distribution in which she stated, "I have made diligent inquiry into the whereabouts of property belonging to the estate; and . . . there is no property available for distribution from the estate over and above the exemptions claimed by the exempted law." In the report, the trustee "certif[ied] that the estate . . . has been fully administered" and requested that she be discharged from further duties as trustee. She later stated in an affidavit—apparently prepared as evidence for the instant case—that before filing the report of no distribution, she had "investigated the potential medical malpractice action" and had "made the determination that this claim was not worth pursuing on behalf of the bankruptcy estate."

On October 3, 2008, approximately one week before the expiration of the limitations period for the malpractice claim, plaintiff filed his complaint in circuit court. Two affidavits of merit were filed with the complaint; one was signed on September 25, 2008, and the other on October 1, 2008.

On May 13, 2009, about 13 months after the trustee had filed her report and the bankruptcy court entered a final decree stating that the case had been fully administered, the trustee was discharged, and the case closed.[4]

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[4] On August 10, 2010, plaintiff's bankruptcy attorney was suspended from the practice of law for a period of three years, effective June 25, 2009, for professional misconduct including failure to adequately communicate with clients, failure to act with reasonable diligence and promptness in representing his clients, misappropriating monies and failing to safeguard client funds, and several other violations of the Michigan Rules of Professional Conduct.

In April 2010, defendants each moved for summary disposition, arguing that plaintiff did not have the legal capacity to sue on the medical malpractice claim and, further, that he should be judicially estopped from claiming damages in excess of $15,000.00. A hearing on the motion was held on July 14, 2010, and on July 22, 2010, the trial court issued its opinion.

II. STANDARD OF REVIEW

We review de novo a trial court's summary disposition ruling. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court based its ruling on a lack of capacity to sue, which is governed by MCR 2.116(C)(5). In reviewing such a ruling, " 'this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties.' " *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003), quoting *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000). Questions of law are reviewed de novo. See *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011). Judicial estoppel is an equitable doctrine. *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999). Findings of fact supporting the trial court's decision are reviewed for clear error, and the application of the doctrine is reviewed de novo. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

III. LEGAL ANALYSIS

A. LEGAL CAPACITY

The trial court held that plaintiff lacked the "legal capacity to sue on the claim" because at the time the complaint was filed, the bankruptcy estate had not been closed. Relying on 11 USC 554, the trial court found

that the bankruptcy estate retained its interest in the potential malpractice lawsuit until it was closed pursuant to the May 13, 2009 bankruptcy court order. Plaintiff makes three arguments on appeal. First, that because plaintiff claimed the statutory exemption under 11 USC 522(d)(11)(D) for the first $18,450 recouped from the lawsuit, and no objection to that exemption was filed, he retained a legal interest in the malpractice suit whether or not the estate had abandoned its interest.[5] Second, that the estate's interest in the malpractice claim was abandoned when the time for objection to the trustee's report of no distribution had passed[6] and that the closing of the bankruptcy case was not a condition precedent to abandonment. Third, that even if the estate's interest had to be abandoned for plaintiff to prosecute the malpractice suit—and it was not abandoned until May 13, 2009, when the court issued the final decree closing the case—plaintiff was a real party in interest by the time defendants filed their summary disposition motion in 2010 and thus, had lawful authority to "prosecute" the action as provided by MCR 2.201(B).

We conclude that at the time plaintiff filed suit, he was a real party in interest.[7] It is uncontested that plaintiff properly listed the potential lawsuit as an asset and was entitled to the exemption under 11 USC 522(d)(11)(D), which provides for an exemption for "a payment . . . on account of personal bodily injury. . . ." A claim for exemption is made in accordance with 11 USC 522(*l*), which provides:

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[5] Although plaintiff raised this argument below, he did not argue it on appeal until the filing of his reply brief. Defendants were subsequently given an opportunity, by this Court's order, to brief the issue, however. Thus, the issue has been fully briefed by both parties.

[6] Fed R Bankruptcy Proc 5009(a).

[7] Accordingly, we need not address plaintiff's remaining arguments regarding the standing issue.

> The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

Fed R Bankruptcy Proc 4003(b) provides that an objection must be filed "within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Plaintiff claimed an exemption for his medical malpractice claim for the maximum allowable under the statute and no objections to the exemption were filed. The validity of plaintiff's claimed exemption in the bankruptcy proceeding is not disputed here, and the United States Supreme Court has gone so far as to hold that even when a bankruptcy petitioner lacks a good faith basis for a claimed exemption, the failure of the trustee and creditors to timely object or seek an extension of time in which to do so still results in the relevant property being exempt. *Taylor v Freeland & Kronz*, 503 US 638, 642-645; 112 S Ct 1644; 118 L Ed 2d 280 (1992).

We find the Fourth Circuit's decision in *Wissman v Pittsburgh Nat'l Bank*, 942 F2d 867, 870 (CA 4, 1991), directly on point. In that case, petitioners, the Wissmans, listed a possible lawsuit against the eventual defendants as an asset of their bankruptcy estate. They also timely asserted their exemption for any value in the potential lawsuit up to the statutory maximum and no objections to the exemption were filed. Later, during the pendency of the bankruptcy case, the Wissmans filed the listed lawsuit. The defendant in that lawsuit filed a motion to dismiss on the ground that the petitioners lacked "standing to pursue the action with-

out the participation of, or the abandonment of the claim by, the bankruptcy trustee." The *Wissman* court rejected this argument, holding:

> "Unless a party in interest objects, the property claimed . . . is exempt." [11 USC 522(*l*)]. *The unequivocal language of the statute does not require abandonment by the trustee as a prerequisite to exemption by the debtor.* Abandonment is the method used by the trustee to relieve the estate of "any property . . . that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 USC § 554. *The trustee may refuse to abandon property that has value to the estate, but if the debtor is entitled by statute to an exemption in it, he may claim it without abandonment by the trustee*. [*Wissman*, 942 F2d at 870 (emphasis added).]

The Fourth Circuit concluded that "the district court erred in holding that abandonment by the trustee was a prerequisite . . . to the Wissmans' standing to pursue the action." *Id.*

The *Wissman* court also concluded that until and unless the trustee abandons the estate's interest in the lawsuit, any amounts recovered in the lawsuit above the amount of the statutory exemption would flow to the bankruptcy estate. *Id.* at 872; see *Schwab v Reilly*, 560 US ___; 130 S Ct 2652, 2668; 177 L Ed 2d 234 (2010). However, the court held that this did not eliminate the debtor's interest in the lawsuit because the statutory exemption to which the plaintiff was entitled, "*represents a present, substantial interest and provides the necessary standing for them to pursue the action.*" *Wissman*, 942 F2d at 872 (emphasis added).[8]

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[8] In the instant case, after plaintiff filed this cause of action the bankruptcy estate was formally closed and at that point, even by defendants' analysis, the estate's interest in the suit was abandoned. Thus, unless the trustee takes some action to reopen the estate, plaintiff will be entitled to the full proceeds from the cause of action.

This decision was followed in *In re Bottcher*, 441 BR 1, 4 (Bankr D Mass, 2010), where the bankruptcy court held:

> *Because the plaintiff has exempted the property and the first $16,500 of recovery on his claims, he is a real party in interest and has standing to bring this action*. *Wissman*, 942 F2d at 870. If the plaintiff is successful, the Chapter 7 Trustee will be entitled to receive a portion of any recovery over and above that amount. *Schwab v Reilly*, [560] US ___; 130 S Ct 2652, 2669; 177 L Ed 2d 234 (2010). [Emphasis added.]

In this case, having an undisputed exemption for the potential lawsuit, plaintiff had standing and was a proper party to bring this suit.[9] Moreover, the exemption was not the full amount of plaintiff's interest in the lawsuit. Any funds recovered in that suit in excess of the sum of administrative fees, exemptions and the approximately $65,000 debt owed by the estate, remained the property of plaintiff. The trial court erred by granting summary disposition based on the conclusion that plaintiff lacked the capacity to sue.

B. JUDICIAL ESTOPPEL

Defendants cross-appeal, arguing that summary disposition should have been granted on the basis of the doc-

[9] Our recent decision in *Young v Independent Bank*, 294 Mich App 141; 818 NW2d 406 (2011) (Docket No. 299192) is inapposite, as in that case the petitioner had failed to claim an exemption for the relevant asset, and the panel never considered the effect of an undisputed exemption on the standing of a petitioner-plaintiff. Indeed, in *Young*, the plaintiff had failed to list the asset altogether in her bankruptcy pleadings. Since a non-listed asset cannot be abandoned by the trustee, and the *Young* plaintiff had no exemption to rely upon, she did not have standing. Here, while we have not reached the question whether the trustee abandoned the estate's interest in light of the report of no distribution, it is clear that because plaintiff listed the asset and claimed the exemption without objection, the question of the instant plaintiff's standing to proceed turns on facts wholly absent from *Young*.

trine of judicial estoppel. For judicial estoppel to apply, a party must have successfully and "unequivocally" asserted a position in a prior proceeding that is "wholly inconsistent" with the position now taken. *Paschke v Retool Indus*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). Plaintiff argues, and the trial court found, that plaintiff's statement of the "market value" of his claim in the bankruptcy schedule was not wholly inconsistent with the jurisdictional limits amount set forth in the circuit court action. We agree, and also conclude for the reasons discussed below, that plaintiff did not, in the course of his bankruptcy, make an "unequivocal" statement of the damages that could be sought in a lawsuit.

The jurisdictional limits would be the "amount in controversy." While "amount in controversy" has not been expressly defined in Michigan case law, *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 475; 628 NW2d 577 (2001), indicates that it is based on the damages claimed. By contrast, the market value of the suit is the amount a third party would reasonably pay for the asset at the time the petition is filed. This distinction was cogently discussed at length in *In re Polis*, 217 F3d 899, 902-903 (CA 7, 2000), where the Seventh Circuit stated as follows in an opinion by Judge Posner:

> The Code provides that the "value" of property sought to be exempted "means fair market value" *on the date the petition for bankruptcy was filed*, 11 USC § 522(a)(2), unless the debtor's estate acquires the property later. On the date Polis filed her petition in bankruptcy, she had not yet sued Getaways, but the legal claim on which the suit was based, having arisen out of a transaction . . . that had occurred before the petition was filed, was already "property" of the debtor and hence of the debtor's estate in bankruptcy. . . .

> Although we may assume . . . that . . . [the] claim is not assignable and so cannot be the subject of a "market" transaction in the literal sense, that is irrelevant. . . . Legal claims are assets whether or not they are assignable, especially when they are claims for money; as a first approximation, the value of Polis's claim is the judgment that she will obtain if she litigates and wins multiplied by the probability of that (to her) happy outcome. That is roughly how parties to money cases value them for purposes of determining whether to settle in advance of trial. . . .
>
> The possibility that the debtor will obtain a windfall as a consequence of the exemptions recognized by the Bankruptcy Code arises from the fact that the date of valuation of an asset for purposes of determining whether it can be exempted is the date on which the petition for bankruptcy is filed; it is not a later date on which the asset may be worth a lot more. Often property appreciates in a wholly unexpected fashion. A lottery ticket that turns out against all odds to be a winner is merely the clearest example. A debtor who exempted a painting thought to be worthless in a market sense, having a purely sentimental value, might discover the day after his discharge from bankruptcy that it had suddenly increased in value because other paintings by the artist had just been bought by the Metropolitan Museum of Art; the creditors could not reach it, provided that until then its fair market value had in fact been slight. Common stock that had traded at $100 a share on the date the petition for bankruptcy was filed might a month later be worth $1,000, and again the creditors would be out of luck if the debtor had exempted her shares by claiming the personal property exemption for them. And so it is with a legal claim. It might when it first accrued have seemed so "far out" that its fair market value would be well within the limits of the exemption, and yet—such are the uncertainties of litigation—it might turn into a huge winner.
>
> This feature of the Code's valuation scheme should not be thought a disreputable loophole. If the assets sought to be exempted by the debtor were not valued at a date early in the bankruptcy proceeding, neither the debtor nor the

> creditors would know who had the right to them. So long as the property did not appreciate beyond the limit of the exemption, the property would be the debtor's; if it did appreciate beyond that point, the appreciation would belong to the creditors, who thus might—if they still remembered their contingent claim to the property—reclaim it many years after the bankruptcy proceeding had ended. The framers of the Bankruptcy Code could have made ineligible for exemption property that has an unusual propensity to fluctuate in value, thus reserving windfall gains to the creditors; but they did not do so, perhaps because of the difficulty of defining the category or allocating its fruits across creditors. An alternative would be to keep the bankruptcy proceeding open indefinitely; the objections are self-evident.
>
> The need in valuing an asset in advance to adjust for the uncertainty that its potential value will be realized is the key to the mistake made here by the bankruptcy and district courts. When there is uncertainty about whether some benefit, here an award of money in a class action suit, will actually be received, the *value* of the (uncertain) benefit is less than the *amount* of the benefit if it is received. A *claim* for $X is not worth $X. A 50 percent chance of obtaining a $1,000 judgment is not worth $1,000. [Citations omitted.]

In the instant case, at the time plaintiff amended his bankruptcy filing to include the claim, no suit had been filed. Indeed, there is no evidence that at the time the potential claim was listed any medical malpractice attorney had agreed to review the potential claim, let alone file and prosecute the lawsuit. The claim was listed as an asset in September 2006. It was not until nearly two years later that a notice of intent was mailed. At the time the asset was listed, therefore, its market value was the amount of damages that would be awarded upon a successful jury trial, discounted by the likelihood that (a) no attorney would agree to review the case; (b) after review, the attorney would decline to

pursue it;[10] (c) once an attorney had agreed to pursue the case, he or she would not be able to find qualified experts to support the case with affidavits of merit;[11] (d) plaintiff would run afoul of any of the various procedural hurdles relevant to medical malpractice cases; (e) direct evidence of medical negligence, even if it occurred, would not be available given that the events all took place in the operating room while plaintiff was unconscious; (f) a jury would reach a no cause of action verdict; (g) non-economic damages would be capped by law; (h) reductions for offsets for collateral source payments would reduce the economic damages; (i) the doctor would not have sufficient insurance to satisfy a judgment; (j) the judgment would be overturned on appeal; and (k) the extent to which the amount ultimately collected would be reduced by costs and attorney fees. Thus, it was entirely consistent for plaintiff to list the market value of his claim as $15,000 while claiming damages in excess of $25,000. The listed market value was not a statement of actual damages from the alleged malpractice and so could not be an "unequivocal" statement of such damages. Defendants have not presented any evidence to establish that the market value of plaintiff's claim was understated in the bankruptcy proceeding and the trustee, having attested that she investigated the malpractice claim before issuing her report of no distribution, concluded that the market value was accurate. Thus, defendants' claim of judicial estoppel fails.

Defendants also argue that the $18,450 exemption is the limit of what plaintiff could recover at the time the

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[10] At the hearing below, plaintiff's counsel asserted that plaintiff's potential malpractice case had been turned down by two malpractice attorneys.

[11] The two affidavits of merit filed by plaintiff were not signed by experts until a few days before the filing of the suit.

lawsuit was filed, and that he therefore did not meet the circuit court jurisdictional requirement of $25,000 or more in controversy. MCL 600.8301(1). Defendants, relying on *Schwab*, 560 US ___; 130 S Ct 2652, reason that any damages beyond the exemption that plaintiff might otherwise be entitled to remained the property of the bankruptcy estate, and therefore the amount in controversy could not be greater than $18,450. However, defendants' reliance on *Schwab* is misplaced. *Schwab* dealt only with the bankruptcy trustee's ability to liquidate an asset. It did not involve the ability of a debtor to bring suit prior to conclusion of his bankruptcy case. Further, as noted above, the bankruptcy estate would only claim enough of the recovery to satisfy plaintiff's debts. That is, there are three layers of possible recovery. The first layer of up to $18,450 would go to plaintiff via the exemption. The second layer of a little less than $65,000 would go to the estate to settle plaintiff's debts. A third layer composed of any excess would then go to plaintiff. Therefore, defendants' argument that plaintiff cannot recover more than $18,450 is incorrect.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

SHAPIRO, P.J., and WHITBECK and MURRAY, JJ., concurred.

MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INC
(ON REMAND)

Docket No. 284037. Submitted September 1, 2011, at Lansing. Decided March 22, 2012, at 9:10 a.m. Leave to appeal sought.

Miller-Davis Company, the general contractor and construction manager for a project that included building a natatorium for a YMCA recreational complex, brought an action in the Kalamazoo Circuit Court against roofing subcontractor Ahrens Construction, Inc., and Merchants Bonding Company, seeking damages on the basis that Ahrens Construction breached its contract with Miller-Davis to install a wooden roofing system in accordance with the terms and requirements of the provided plans and specifications. Miller-Davis also sought damages for contractual indemnity. Following a bench trial, the court, Gary C. Giguere, Jr., J., concluded that Ahrens Construction had breached its contract with Miller-Davis and that the breach caused the natatorium moisture problem that had occurred. The court found in favor of Miller-Davis on the breach of contract claim, but entered a judgment of no cause of action for the contractual indemnity claim. Merchants Bonding ultimately settled with Miller-Davis. Ahrens Construction appealed the court's breach of contract finding, and Miller-Davis cross-appealed the contractual indemnity determination. The Court of Appeals, JANSEN, P.J., and HOEKSTRA and MARKEY, JJ., held that MCL 600.5839(1) time-barred Miller-Davis's claims. 285 Mich App 289 (2009). The Supreme Court reversed and remanded for application of the general six-year period of limitations, MCL 600.5807(8), a determination of when Miller-Davis's claims accrued, and consideration of the remaining issues raised in the appeal and cross-appeal. 489 Mich 355 (2011).

On remand, the Court of Appeals *held*:

1. Under MCL 600.5807(8), an action to recover damages for a breach of contract must be brought within six years after the claim first accrued. Except in certain circumstances not applicable in this case, MCL 600.5827 provides that a claim accrues at the time the wrong on which the claim is based was done, regardless of when the damage results. A construction contract must be examined to determine the wrong on which the breach is based, and the

cause of action accrues at the time work on the contract is completed. Miller Davis's breach of contract claim, which was filed on May 12, 2005, was barred by the six-year period of limitations because Ahrens Construction completed its work on the project by the end of February 1999 and the alleged breach—that Ahrens Construction had not complied with the terms and requirements of the plans and specifications—must have occurred by that date. The breach of contract claim did not accrue on the date the project was certified as being substantially complete by the owner, the architect, and Miller-Davis or on the date the certificate of occupancy was issued.

2. The contract's charge-back clause granted Miller-Davis authority to require Ahrens Construction to correct any failure to perform as required under the contract. However, Ahrens Construction's refusal to perform corrective work on the natatorium in 2003 was not a breach of the contract's charge-back clause. The charge-back clause was intended to ensure timely completion of the project by permitting Miller-Davis to intervene if Ahrens Construction had defaulted on its duties. The clause did not give Miller-Davis the right to demand corrective work after the project had been substantially completed and Ahrens construction had been paid for its work. In addition, Ahrens Construction's refusal to perform the corrective work did not reset the accrual date of the breach of contract claim under MCL 600.5807(8) and MCL 600.5827.

3. An indemnity contract is not intended to be used as a sword and shield in disputes between the contracting parties with respect to the performance of the contract itself. Indemnification clauses are meant to apportion liability among the contracting parties for liability to third parties. The period of limitations on a promise to indemnify runs from when the indemnitee sustained the loss or when the promisor failed to perform under the contract. Ahrens Construction did not breach the contract's indemnity clause because no claims or demands were made, brought, or recovered against Miller-Davis on which to base a claim for indemnification. Miller-Davis could not use the alleged breach of the indemnification clause as an alternative accrual date for its underlying breach of contract claim regarding Ahrens Construction's alleged failure to comply with the terms and requirements of the plans and specifications.

4. Even if the project owner's demand that Miller-Davis correct the natatorium's moisture problem was a demand within the meaning of the indemnification clause, it was still necessary to affirm the trial court's finding of no cause of action because the

demand arose out of a contract between the owner and Miller-Davis and there was insufficient evidence to prove that the moisture problem was caused by Ahrens Construction's failure to follow plans and specifications or by faulty workmanship. Although the moisture issue disappeared after Miller-Davis's corrective action, it could not be inferred that Ahrens Construction's work was defective because the corrective work included elements that were not present in the original plans and specifications.

5. Miller-Davis waived any claim that certain sections of documents from the American Institute of Architects were pertinent to its contract claims because it raised this issue for the first time on remand.

Reversed in part, affirmed in part, and remanded for entry of judgment in favor of Ahrens Construction.

1. CONTRACTS — CONSTRUCTION CONTRACTS — BREACH — STATUTES OF LIMITATIONS — ACCRUAL OF CLAIM.

An action to recover damages for a breach of contract must be brought within six years after the claim first accrued; except in certain circumstances, a claim accrues at the time the wrong upon which the claim is based was done, regardless of when the damage results; a cause of action for breach of a construction contract accrues at the time work on the contract is completed (MCL 600.5807[8], 600.5827).

2. INDEMNITY — CONTRACTS — STATUTES OF LIMITATIONS.

An indemnity contract is meant to apportion liability among the contracting parties for liability to third parties; the period of limitations on a promise to indemnify runs from when the indemnitee sustained the loss or when the promisor failed to perform under the contract.

Howard & Howard Attorneys, P.C. (by *Scott Graham*), and *Gemrich Law PLC* (by *Alfred J. Gemrich*) for Miller-Davis Company.

Field & Field, P.C. (by *Samuel T. Field*), for Ahrens Construction, Inc.

ON REMAND

Before: JANSEN, P.J., and HOEKSTRA and MARKEY, JJ.

PER CURIAM. In this case, defendant[1] appealed the judgment entered for plaintiff after a bench trial on plaintiff's breach of contract claims. Plaintiff filed a cross-appeal of a judgment of no cause of action on its claim for contractual indemnity. This Court held that MCL 600.5839(1) time-barred plaintiff's claims. *Miller-Davis Co v Ahrens Constr, Inc*, 285 Mich App 289, 292, 312-313; 777 NW2d 437 (2009). Our Supreme Court reversed, holding that "MCL 600.5839 is limited to tort actions." *Miller-Davis Co v Ahrens Const, Inc*, 489 Mich 355, 371; 802 NW2d 33 (2011). The Court concluded that the general six-year period of limitations applicable to actions for breach of contract, MCL 600.5807(8), which "runs from the date the 'claim first accrued,' " applied in this case. *Miller-Davis*, 489 Mich at 358. "Because there [was] a question about the date plaintiff's action accrued," the Court remanded the case to this Court "to resolve this issue, as well as other issues not yet considered." *Id*. Later, the Court indicated that on remand this Court should apply MCL 600.5807(8) and, "if necessary, [consider] the remaining issues raised in the appeal and cross-appeal." *Id*. at 372. We reverse in part, affirm in part, and remand for entry of judgment for defendant.

We review de novo as a question of law whether a claim is barred by a statute of limitations. *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006).

We are to apply MCL 600.5807, which provides:

> No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, *after the*

[1] "Defendant," as used in this opinion, refers only to Ahrens Construction, Inc. Merchants Bonding Company, defendant's surety, settled with plaintiff and is not a party to this appeal.

> *claim first accrued* to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.
>
> * * *
>
> (8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract. [Emphasis added.]

Thus, MCL 600.5807(8) requires that an action to recover damages for breach of contract must be brought within six years after the claim first accrued. *Miller-Davis*, 489 Mich at 358; *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245; 673 NW2d 805 (2003).

With respect to accrual of a claim, MCL 600.5827 provides that except for cases covered by MCL 600.5829 to MCL 600.5838, "[a] claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Sections 5829 to 5838 cover claims relating to possession of land, a mutual and open account, warranty, common carriers, life insurance, installment contracts, alimony, and malpractice. None of these provisions applies in this case. Although plaintiff presents arguments in its supplemental brief regarding certain warranty provisions, plaintiff's complaint did not include a claim for breach of warranty. *Miller-Davis*, 489 Mich at 359; *Miller-Davis*, 285 Mich App at 306.

A contract claim accrues when the wrong occurs, i.e., when the promise is breached, regardless of when damage results. MCL 600.5827; *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 355; 771 NW2d 411 (2009); *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008). The "wrong" on which the contract claim is based is determined by examining the parties' contract. *Tenneco*, 281

Mich App at 458, citing *Scherer* 270 Mich App at 463. Although plaintiff asserts the breach of a so-called charge-back clause and an indemnification clause, the underlying basis for its claim is that defendant breached a contract condition providing that "[a]ll materials and/or work furnished on this order shall comply with the terms and requirements of the plans and specifications - where applicable."[2]

Plaintiff was the general contractor on a construction project that included building a natatorium for a YMCA recreational complex, and defendant was a subcontractor with the responsibility of installing a proprietary wooden roofing system over which other roofing materials would be installed by other subcontractors. *Miller-Davis*, 285 Mich App at 292-293, 309. The wrong that plaintiff alleged with respect to defendant's having failed to "comply with the terms and requirements of the plans and specifications" of the contract must have occurred on or before defendant completed its portion of the overall construction project. This conclusion is consistent with this Court's prior decisions. "A cause of action for breach of a construction contract accrues at the time work on the contract is completed." *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991), citing *Buckey v Small*, 52 Mich App 454, 455-456; 217 NW2d 422 (1974). In our prior opinion, we addressed the date when defendant completed its work on the project. In particular, we noted that defendant completed its work on the project by the end of February 1999 and certified to plaintiff that the work was complete on April 26, 1999, for the purpose of being paid.

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[2] Plaintiff does not cite this provision in its complaint, but it is the only one that corresponds to plaintiff's theory of the case and the allegation in its complaint that defendant failed "to install the Roof System correctly and in compliance with the plans and specifications . . . ."

> By the end of February 1999, defendant completed all its tasks regarding constructing the roof system, including installing all the wood parts, the vapor barrier, the T's and sub-T's [superstructures], the insulation, all of which were covered by [oriented strand board] nailed on top of two-by-four inch "sleepers" running perpendicular over the T's to the top ridge of the roof. . . . Defendant certified to plaintiff that it had completed its work on the roof on April 26, 1999, and plaintiff paid defendant for this work the next day.
>
> * * *
>
> . . . [I]t is undisputed, and the trial court so found, that defendant completed its work on its part of the natatorium's roof by the end of February 1999. Thereafter, the evidence clearly establishes that another contractor completed the final phase of the roof's construction by attaching the roofing felt and the standing seam steel skin. Plaintiff's exhibit 9, the minutes of a work-progress meeting on February 18, 1999, indicates that over the prior two weeks Ahrens completed its roof work at the recreational building, and that work for the next two weeks contemplated subcontractor Architectural Glass & Metals' completing the metal roof at the recreation building. [*Miller-Davis*, 285 Mich App at 296-297, 309.]

We have not been presented any reason to revisit this analysis of when defendant completed the work it contracted with plaintiff to perform. Because defendant completed its work on the roof by the end of February 1999, the breach that plaintiff alleged—that defendant had failed to comply with the terms and requirements of the plans and specifications—must have occurred by that date. Further, because plaintiff did not file its complaint until May 12, 2005, more than six years after February 1999 and more than six years after plaintiff accepted the work through its payment at the end of April 1999, the statute of limitations barred those claims. MCL 600.5807(8); *Buckey*, 52 Mich App at 455-456.

Plaintiff asserts in its supplemental brief on remand that defendant waived application of the statute of limitations by not briefing and arguing the proper statute, MCL 600.5807(8). We find this argument disingenuous and reject it. At the outset of this case, defendant set forth several affirmative defenses to plaintiff's complaint. The affirmative defense defendant first asserted was the statute of repose. The second affirmative defense that defendant set forth was that plaintiff's claim was barred by the applicable statute of limitations. Throughout this litigation, in the trial court and on appeal, plaintiff has argued that MCL 600.5807(8) is the proper statute to determine whether its complaint was timely; defendant has argued that MCL 600.5839(1) was the proper statute for doing so. Our Supreme Court has now resolved the issue and remanded the case for this Court to apply MCL 600.5807(8) to determine whether plaintiff's breach of contract claims are time-barred. We find no reason not to comply with the remand instructions.

Plaintiff also argues that its claim accrued on June 11, 1999, the date the construction project was certified as being substantially complete by the YMCA, the architect, and plaintiff. Alternatively, plaintiff asserts that the date the certificate of occupancy was issued, August 2, 1999, is the pertinent accrual date. For the reasons already discussed, we reject these alternative accrual dates as applicable to when the purported breach of contract—the wrong—occurred. We note that the date of substantial completion, June 11, 1999, fixed the beginning of the one-year guarantee period that defendant provided regarding its work. Although the natatorium moisture problem was apparent almost immediately after occupancy, plaintiff made no claim

against defendant during the guarantee period.[3]

Plaintiff also asserts that defendant breached its contract in 2003 when defendant refused plaintiff's demand for corrective work that required deconstructing the natatorium's roof and reconstructing it according to a modified design that included application of a waterproofing element not in the original plans and specifications. Plaintiff asserts that defendant's refusal to perform the corrective work was a breach of the contract's so-called charge-back clause. This argument presents an issue of contract interpretation, which is a question of law we review de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

The primary goal of interpretation of a contract is to honor the intent of the parties. *Tenneco*, 281 Mich App at 444. "[I]t is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). When a contract, though poorly drafted or clumsily arranged, fairly discloses only one meaning, it is not ambiguous. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Like a statute, a contract must be construed as a whole, and its terms must be construed in context. *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516

[3] Plaintiff sent letters to defendant dated January 28, 2000, and February 8, 2000, with notice of the moisture problem. The first letter noted that while others suspected defendant as a possible cause of the problem, plaintiff's vice president of construction management stated in the letter that plaintiff did "not agree with this assessment."

(2000). Thus, when reading the terms of a contract according to their commonly used meaning, courts must also consider that "under the doctrine of *noscitur a sociis*, a word or phrase is given meaning by its context or setting." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007) (citations and quotation marks omitted).

The charge-back clause of the parties' eight-page purchase-order contract provides:

> Should you, the Subcontractor, at any time refuse to start said work promptly, neglect to supply a sufficient number of properly skilled workmen or sufficient materials of the property quality, or fail in any respect to prosecute the work with promptness and diligence, or if you should fail in performance of any of the agreements herein contained, MILLER-DAVIS COMPANY without prejudice to any other available remedy may, after twenty-four (24) hours written notice to you, provide any such labor or materials and deduct the cost thereof from any money then due or thereafter to become due you under this Subcontract; but if such expense and damage shall exceed such unpaid balance, you shall pay the difference to MILLER-DAVIS COMPANY.

We conclude that a fair reading of the charge-back clause in context does not admit of an interpretation that plaintiff may at any time it chooses, after plaintiff has accepted defendant's contract work and the project itself has been substantially completed, require defendant to correct work plaintiff believes is nonconforming. Rather, the paragraphs above and below the charge-back clause on the same page all relate to management and payment for defendant's work while the construction project is ongoing. The three paragraphs above the clause provide that "[t]ime of completion is of the essence of this order," that defendant must

follow the direction of plaintiff's construction manager, and that defendant must complete its work in a manner that does not interfere with or delay the work of other subcontractors. Below the charge-back clause, a paragraph requires defendant to comply with applicable safety laws and regulations. The final paragraph on the same page provides for payment to defendant, which "will be made each month equal to 90% of the value of the work satisfactorily completed . . . ." Moreover, the internal wording of the charge-back clause makes sense only if applied to the period when construction is ongoing, the subcontracted work is not complete, and money due under the contract remains unpaid. For these reasons, we conclude that the charge-back clause was intended only to ensure timely completion of the project by permitting plaintiff to intervene if defendant defaulted during the construction phase of the project.

Our reading of the charge-back clause is also consistent with defendant's having provided a one-year guarantee of its work from the date of substantial completion of the project. In contrast, plaintiff's reading of the charge-back clause would render superfluous defendant's one-year guarantee. Thus, we conclude, on the basis of reading the charge-back clause as a whole and its placement in the contract, that the clause does not give plaintiff the right to demand corrective work after the project has been substantially completed and defendant has been paid for its work. Consequently, defendant did not breach the charge-back clause in 2003 when it refused plaintiff's demand that it perform corrective work on the natatorium roof. Plaintiff could still have timely brought its breach of contract claim on the theory of nonconforming work, but its declaration of defendant's default in 2003 for failing to perform corrective work did not reset the accrual date of that claim under MCL 600.5807(8) and MCL 600.5827.

We further note that our reading of the charge-back clause is consistent with our prior analysis of that provision. In discussing whether "acceptance" of defendant's work occurred within the meaning of MCL 600.5839(1), we opined:

> Moreover, even if the owner of the improvement must trigger "acceptance," plaintiff as the general contractor-construction manager for the project was the authorized representative of the owner for purposes of supervising construction, deeming whether subcontractor work was acceptable under the subcontract's "charge-back" provision, and having the ability to withhold payment for unacceptable work. Here, the undisputed facts, and as found by the trial court, establish that defendant "completed the natatorium roof by February 18, 1999[,] . . . submitted its final request for pay on April 26, 1999, and Miller-Davis paid Ahrens the very next day." Although plaintiff asserts it never "accepted" defendant's work on the roof, plaintiff's own actions in accepting defendant's certification that the roof work had been completed, and then paying for that work, speaks louder than its litigation denials. In sum, we conclude that the facts establish that by the end of April 1999 plaintiff's actions constituted "acceptance of the improvement" defendant made to real property triggering the running of the six-year limitations period of MCL 600.5839(1). [*Miller Davis Co*, 285 Mich App at 311-312 (alterations in original).]

As discussed already, these dates also fixed the accrual date for plaintiff's breach of contract claim regarding alleged nonconforming work under the applicable statute of limitations, MCL 600.5807(8). *Employers Mut Cas Co*, 190 Mich App at 63.

The last contract claim that plaintiff asserted in its May 12, 2005, complaint is that defendant breached an indemnity clause by not reimbursing plaintiff for the costs associated with the 2003 corrective work, lost business profits, and its attorney fees for this action.

After a bench trial, the trial court ruled that plaintiff had no cause of action for contractual indemnity because "no claims, suits, actions, recoveries, or demands were ever made, brought or recovered against" plaintiff within the meaning of the indemnity clause in plaintiff's contract with defendant. This ruling is the subject of plaintiff's cross-appeal.

Regarding the statute of limitations on a promise to indemnify, "the period of limitations runs from 'when the indemnitee sustained the loss,' or 'when the promisor fails to perform under the contract.' " *Tenneco*, 281 Mich App at 458 (citations omitted). Under plaintiff's interpretation of the indemnity clause, the alleged breach of promise occurred in 2003 when defendant refused to reimburse plaintiff its costs associated with the corrective work on the roof of the YMCA's natatorium. This claim was clearly brought within the six-year period of limitations. MCL 600.5807(8). The issue remains whether the trial court correctly ruled that the indemnity clause of the parties' contract did not apply on the facts of this case. This is an issue of contract interpretation we review de novo, as already discussed. "An indemnity contract is to be construed in the same fashion as other contracts." *Zahn v Kroger Co*, 483 Mich 34, 40; 764 NW2d 207 (2009).

The indemnity clause of the parties' contract provides, in pertinent part:

> You as a Subcontractor/Supplier agree to . . . indemnify Miller-Davis Company . . . from and against all claims, damages, losses, demands, liens, payments, suits, actions, recoveries, judgments and expenses *including attorney's fees*, interest, sanctions, and court costs *which are made, brought, or recovered against Miller-Davis Company*, by reasons of or resulting from, but not limited to, any injury, damage, loss, or occurrence arising out of or resulting from the performance or execution of this Purchase Order and

> caused, in whole or in part, by any act, omission, fault, negligence, or breach of the conditions of this Purchase Order by [defendant], its agents, employees, and subcontractors regardless of whether or not caused in whole or in part by any act, omission, fault, breach of contract, or negligence of Miller-Davis Company. The Subcontractor/Supplier shall not, however, be obligated to indemnify Miller-Davis Company for any damage or injuries caused by or resulting from the sole negligence of Miller-Davis Company.
>
> You as Subcontractor/Supplier agree to defend, hold harmless and indemnify Miller-Davis Company, the Owner, the Architect and other parties for all liabilities, either in tort or contract, in the same manner and to the same extent that Miller-Davis Company is required to defend, hold harmless and indemnify the Owner, Architect or other parties pursuant to Miller-Davis Company's Contract with the Owner, unless the liability arises solely as a result of the negligence of Miller-Davis Company or its employees and agents. [Emphasis added.]

Plaintiff argues that the use of the word "all" in the indemnification clause means the clause is intended to provide the broadest possible coverage. Further, plaintiff argues, the indemnification clause requires that defendant indemnify plaintiff for "*all* . . . damages, losses . . . and expenses *including attorney's fees*" caused by defendant's breach of contract, i.e., the failure to comply with the contract's plans and specifications. Plaintiff also asserts that the trial court clearly erred by finding that plaintiff was not under "demand" when it performed the corrective work because the indemnification clause is not conditioned on the filing of a formal claim or suit against plaintiff.

We conclude that the trial court correctly ruled that no one had brought a claim or demand against plaintiff within the meaning of the indemnification clause. Thus, because no claims or demands were "made, brought or

recovered against" plaintiff, defendant did not breach this provision of the contract. Moreover, plaintiff cannot use the alleged breach of this provision (and thus plaintiff's completion of the corrective work) as an alternative accrual date for its underlying breach of contract claim regarding defendant's alleged failure to comply with the terms and requirements of the plans and specifications.

We read the indemnification clause as those clauses have traditionally been applied: to apportion ultimate liability among the contracting parties for liability to third parties. See *Baker Contractor, Inc v Chris Nelsen & Son, Inc*, 1 Mich App 450, 454; 136 NW2d 771 (1965). Indemnification clauses are not intended to be used as a sword or shield in disputes between the contracting parties with respect to the performance of the contract itself. *Id*. This view of the clause is buttressed by the second paragraph extending defendant's duty to indemnify to the other contracting parties from "all liabilities, either in tort or contract tort or contract."

Additionally, we note that even if the owner's "demand" that plaintiff correct the natatorium moisture problem was within the meaning of the indemnification clause, we would still affirm the trial court on this issue on alternative grounds. To the extent the owners demanded that plaintiff correct the natatorium moisture problem, the demand arose out of the owner's contract with plaintiff, not plaintiff's subcontract with defendant. "When a trial court reaches the right result for the wrong reason, the ruling will not be disturbed." *Burise v City of Pontiac*, 282 Mich App 646, 652 n 3; 766 NW2d 311 (2009).

Moreover, plaintiff failed to present sufficient proof at trial that the moisture problem was caused by defendant's failure to follow plans and specifications or

by faulty workmanship. There is no evidence in the record that supports a conclusion that defendant's alleged defective workmanship caused the moisture problem other than an inference drawn from the fact that after the corrective work it was no longer present. The logical force of this inference, however, is totally lacking because the corrective work contained three important elements that were not present in the original plans: (1) a waterproofing agent was added, (2) expanding foam insulation sealed any gaps between the structural support and the Styrofoam block, and (3) butyl caulk sealant was applied to the top of all T superstructures.

A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach. *Stevenson v Brotherhoods Mut Benefit*, 312 Mich 81, 90-91; 19 NW2d 494 (1945); *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993) (recognizing that the "preponderance of the evidence" is the quantum of proof in civil cases); see M Civ JI 142.01. This standard means the evidence must persuade the fact-finder that it is more likely than not that the proposition is true. M Civ JI 8.01. A party may meet its burden with circumstantial evidence, *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001), and the fact-finder may weigh both the quality and the quantity of evidence presented, *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001).

The specific weakness in plaintiff's case is the lack of evidence to causally link defendant's alleged nonconforming workmanship to the moisture problem, which is the basis for plaintiff's claim for damages in the form

of expenses to correct the cold-weather condensation problem in the YMCA's natatorium. "Damages are an element of a breach of contract action." *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 69; 761 NW2d 832 (2008). Like other civil actions, the plaintiff in a breach of contract case must establish a causal link between the alleged improper conduct of the defendant and the plaintiff's damages. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), and *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 679; 591 NW2d 438 (1998). Because of the similarity between this element of proof in contract cases and the element of causation necessary in tort cases, it is appropriate to draw on the latter for guidance regarding the necessary quality of evidence to satisfy this burden of proof.

This Court in *Karbel*, 247 Mich App at 98, examined the "the basic legal distinction between a reasonable inference and impermissible conjecture" by quoting *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956):

> " '[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. *There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only.* On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.' "

In *Skinner*, 445 Mich at 164, the Court noted that to be adequate, "a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."

> " 'The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. *A mere possibility of such causation is not enough*; and when the matter remains one of pure speculation or conjecture, or *the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant*.' " [*Id*. at 165, quoting *Mulholland v DEC Int'l Corp*, 432 Mich 395, 416, n 18; 443 NW2d 340 (1989), quoting Prosser & Keeton, Torts (5th ed), § 41, p 269 (emphasis added).]

Although these cases considered when a plaintiff had presented sufficient evidence to allow submission of the case to a jury, the same principles apply equally to cases tried before a judge without a jury. See *Mich Aero Club v Shelley*, 283 Mich 401, 403-404, 410-411; 278 NW 121 (1938).

The only evidence in the record that supports finding that defendant's allegedly defective workmanship caused the natatorium moisture problem is an inference drawn from the fact that after the corrective work the problem was not present. The logical force of this inference is totally lacking because the corrective work contained three important elements, as noted already, that were not present in the original plans and specifications. Without other evidence, it is equally likely that the elements added to the reconstructed roof, as opposed to correcting the alleged defects, prevented the condensation problem. As such, it is mere speculation or conjecture to infer that this evidence established a causal link between defendant's workmanship and the moisture problem. *Skinner*, 445 Mich at 164-165; *Karbel*, 247 Mich App at 93. "A judgment may not be based upon speculation or conjecture." *Shelley*, 283 Mich at 412. Consequently, even if the indemnity clause applied on these facts, the trial court correctly entered a judg-

ment of no cause of action on plaintiff's claim for contractual indemnity. We will affirm the trial court when it reaches the right result even if it does so for the wrong reason. *Burise*, 282 Mich App at 652 n 3.

Finally, plaintiff asserts for the first time in its supplemental brief on remand that certain sections in form contract documents of the American Institute of Architects (AIA), "General Conditions of the Contract for Construction," are pertinent to its contract claims against defendant. Although the documents were admitted at trial, the record is not clear whether they were part of the contract between plaintiff and defendant. Nor does it appear that any argument was presented to the trial court concerning their application to this case. Finally, plaintiff's complaint did not refer to the documents, nor did it have attached to it the pertinent parts on which plaintiff now wishes to rely. See MCR 2.113(F). Under these circumstances, plaintiff has waived any claims regarding the AIA documents.

We reverse in part, affirm in part, and remand for entry of judgment for defendant. We do not retain jurisdiction.

JANSEN, P.J., and HOEKSTRA and MARKEY, JJ., concurred.

TITAN INSURANCE COMPANY v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 301214. Submitted January 10, 2012, at Detroit. Decided March 27, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 858.

Titan Insurance Company brought an action in the Genesee Circuit Court against State Farm Mutual Automobile Insurance Company, seeking a declaratory judgment regarding the obligations of the parties to pay personal protection insurance (PIP) benefits to Kenneth Curler for injuries he sustained in an accident that occurred when the motorcycle he was riding collided with an automobile. Neither Curler nor the operator of the automobile was covered by a no-fault policy applicable to Curler's injuries. The Michigan Assigned Claims Facility selected Titan to administer the payment of PIP benefits to Curler and Titan paid the benefits. After discovering that Edward Shreve, Jr., appeared to be the last titled owner of the motorcycle and that Shreve was insured under an automobile policy issued by State Farm, Titan filed its complaint, seeking a declaration that Curler was entitled to benefits under State Farm's policy issued to Shreve and that State Farm was required to reimburse Titan for the benefits paid to Curler. Titan sought summary disposition, attaching to its supporting brief a copy of a Michigan certificate of title for the motorcycle showing the signatures of Curler and Shreve and the date of June 18, 2006, the day following the accident. Titan acknowledged that Shreve had stated in a deposition that on or about June 14, 2006, he had sold the motorcycle to a person named "Jay" and had signed and surrendered the title and the motorcycle to Jay at that time. Titan contended that at the time of the accident Shreve was the owner or registrant of the motorcycle and, therefore, under MCL 500.3114(5), Curler was entitled to benefits from State Farm, Shreve's insurer. State Farm filed a counter-motion for summary disposition, contending that because Shreve had transferred the title to Jay before the accident, Shreve was not the owner of the motorcycle at the time of the accident, citing MCL 257.233(9), and Shreve's liability ended when he signed the title and transferred possession of the motorcycle to Jay. The court, Geoffrey L. Neithercut, J., granted summary disposition in favor of State Farm, concluding that Shreve had assigned the title to Jay, who then

assigned it to Curler and, because Shreve signed the certificate of title and delivered the motorcycle to Jay before the accident occurred, State Farm had no liability. Titan appealed as of right. The Court of Appeals, ZAHRA, P.J., and O'CONNELL and FORT HOOD, JJ., in an unpublished opinion per curiam, issued January 8, 2009 (Docket No. 282860), reversed the trial court's order and remanded the matter for further proceedings after holding that the trial court erred by determining that there was no genuine issue of material fact regarding Shreve's transfer of the title to Jay before the accident. The Court of Appeals then denied Titan's motion for reconsideration or clarification that alleged that Shreve was the titled owner at the time of the accident and remained the registrant, so State Farm was responsible for reimbursing the PIP benefits Titan paid under MCL 500.3114(5). On remand, Titan moved for summary disposition, contending that while genuine issues of material fact existed with regard to the ownership of the motorcycle at the time of the accident, there was no question that under MCL 257.234 Shreve remained the registrant at the time of the accident because Shreve had left his unexpired license plate on the motorcycle when he sold the motorcycle to Jay and, after buying the motorcycle from Jay, Curler did not attempt to obtain a new plate until the day after the accident. State Farm argued that it was entitled to summary disposition because Shreve had testified that he no longer had an insurable interest in the motorcycle and Curler had confirmed that the sale and the transfer of the motorcycle and the title occurred well before the accident occurred. State Farm also argued that Titan's claim that Shreve remained the registrant had been rejected by implication in the unpublished opinion per curiam of the Court of Appeals. The trial court granted summary disposition in favor of State Farm on the basis that MCL 257.233(9) says that the effective date of the transfer of interest in a vehicle is the date of signature, or the assignment of the certificate of title. The trial court denied Titan's subsequent motion for reconsideration, noting that there was no genuine issue of material fact that Shreve no longer had an insurable interest in the motorcycle. Titan appealed as of right.

The Court of Appeals *held*:

1. The terms "owner" and "registrant" as used in the no-fault act are not synonymous and represent separate categories of individuals.

2. An unexpired registration plate affixed to a vehicle serves as presumptive evidence that the vehicle is validly registered with the Secretary of State and that it carries the statutorily mandated no-fault insurance. It logically follows that to destroy that pre-

sumption, the appropriate course of action after the sale of a vehicle is for the seller to remove the registration plate and the certificates of registration and insurance from the vehicle. When a seller fails to remove an unexpired registration plate from the vehicle a reasonable inference can be made that the seller voluntarily remains the insuring registrant of the vehicle.

3. Although Shreve may have canceled his policy of insurance on the motorcycle three months before the sale, there is no evidence that the cancellation was done in anticipation of the sale of the motorcycle and it appears that the insurance was canceled merely because Shreve had no intention of using the motorcycle at that time. Moreover, while Shreve apparently removed the certificates of registration and insurance from the motorcycle before he relinquished possession of the motorcycle, the fact remains that Shreve failed to remove his unexpired license plate from the motorcycle. A reasonable inference can be made that Shreve voluntarily remained the insuring registrant. Shreve's insurer, State Farm, was therefore obligated to pay PIP benefits in this case.

Reversed.

1. INSURANCE — NO-FAULT INSURANCE — WORDS AND PHRASES — OWNER — REGISTRANT.

The terms "owner" and "registrant" as used in the no-fault insurance act are not synonymous and represent separate categories of individuals. (MCL 500.3101 *et seq*.).

2. MOTOR VEHICLES — REGISTRATION PLATES — CERTIFICATES OF REGISTRATION AND INSURANCE — PRESUMPTION OF VALID REGISTRATION — INFERENCE OF VOLUNTARILY REMAINING INSURING REGISTRANT.

An unexpired registration plate affixed to a vehicle serves as presumptive evidence that the vehicle is validly registered with the Secretary of State and that it carries the statutorily mandated no-fault insurance; the appropriate course of action to destroy that presumption after the sale of the vehicle is for the seller to remove the registration plate and the certificates of registration and insurance from the vehicle; a reasonable inference can be made that the seller voluntarily remained the insuring registrant of the vehicle when the seller failed to remove an unexpired registration plate from the vehicle.

Law Offices of Ronald M. Sangster, PLLC (by *Ronald M. Sangster, Jr.*), for plaintiff.

Bensinger, Cotant & Menkes, P.C. (by *Dale L. Arndt*), for defendant.

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM. Plaintiff, Titan Insurance Company, appeals as of right an order granting summary disposition in favor of defendant, State Farm Mutual Automobile Insurance Company, in this dispute over the priority of insurers to pay personal protection insurance (PIP) benefits. We reverse.

I. FACTS AND PROCEDURAL HISTORY

This is the second time this case has been before this Court. The facts were set forth in *Titan Ins Co v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2009 (Docket No. 282860), pp 1-2 (*Titan I*):

> This case involves a dispute between plaintiff and defendant to determine which insurer has priority for the payment of no-fault benefits to Kenneth Curler. On June 17, 2006, Curler was injured when the motorcycle he was riding collided with a vehicle. Neither Curler nor the operator of the vehicle was covered by a no-fault policy applicable to Curler's injuries. The Michigan Assigned Claims Facility selected plaintiff to administer payment of . . . (PIP) benefits to Curler. Plaintiff paid PIP benefits to Curler.
>
> Plaintiff discovered that Edward Shreve, Jr., seemingly was the last titled owner of the motorcycle that Curler was riding when the accident occurred, and that at that time Shreve was insured under an automobile policy issued by defendant. Plaintiff filed a complaint for declaratory relief, seeking a declaration that Curler was entitled to benefits under defendant's policy issued to Shreve, and that defendant was required to reimburse plaintiff for the benefits paid to Curler.

Plaintiff sought summary disposition pursuant to MCR 2.116(C)(10). Plaintiff attached to its brief in support of its motion a copy of a State of Michigan Certificate of Title showing the signatures of Curler and Shreve and the date of June 18, 2006. Plaintiff acknowledged that in his deposition, Shreve contended that on or about June 14, 2006, he sold the motorcycle to a person named Jay, last name unknown, for cash, and signed and surrendered the title and the motorcycle to Jay at that time. Shreve asserted that he had no documentation of the sale to Jay. Plaintiff contended that at the time of the accident Shreve was the owner or registrant of the motorcycle; therefore, under MCL 500.3114(5), Curler was entitled to benefits from defendant, Shreve's insurer.

Defendant filed a counter-motion for summary disposition pursuant to MCR 2.116(C)(10) and (I)(2). Defendant asserted that Shreve's deposition testimony established that he had transferred the title to the motorcycle to Jay prior to Curler's accident, and that therefore, Shreve could not be deemed an owner of the motorcycle at the time the accident occurred. MCL 257.233(9). Defendant contended that Jay was responsible for obtaining a new certificate of title, MCL 257.234(1), and that Shreve's liability ended when he signed the titled [sic] and transferred possession of the motorcycle to Jay.

The trial court denied summary disposition for plaintiff and granted summary disposition in favor of defendant. The trial court found that Shreve assigned the title to Jay, who then assigned it to Curler. The trial court concluded that because Shreve signed the certificate of title and delivered the motorcycle to Jay before the accident occurred, Shreve's insurer, defendant, had no liability.

Titan appealed. At issue on appeal was the interpretation of MCL 500.3114(5), which provides:

A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or pas-

> senger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the *owner or registrant* of the motorcycle involved in the accident. [Emphasis added.]

Also at issue was MCL 257.233(9), which provided at the time of the accident:

> Upon the delivery of a motor vehicle and the transfer, sale, or assignment of the *title or interest* in a motor vehicle by a person, including a dealer, the effective date of the transfer of title or interest in the vehicle shall be the date of execution of either the application for title or the assignment of the certificate of title. [Emphasis added.]

This Court reversed the trial court's order and remanded for further proceedings after holding that the trial court erred by determining that there was no genuine issue of fact regarding Shreve's transfer of title to Jay before the accident. Shreve's deposition testimony was relied on to support this Court's conclusion:

> [T]he certificate of title contains Shreve's signature, Curler's signature, and the date of June 18, 2006, which is one day after the accident. At a minimum, a question of fact exists regarding the date on which Shreve transferred the title to the motorcycle, and to whom. Pursuant to MCL 257.233(9) as it read at the time of the accident, "the effective date of [the] transfer of title or interest" in the motorcycle was the date of execution of the assignment of the title. Evidence exists that that date was June 18, 2006, the day after the accident occurred. If the title was not

> transferred until that date, Shreve was the titled owner of the motorcycle on June 17, 2006. Under those circumstances, defendant would be liable for payment of PIP benefits to Curler. [*Titan I*, unpub op at 3.]

Titan filed a motion for reconsideration or clarification. It argued that Shreve was the titled owner of the motorcycle at the time of the accident, as shown by the authenticated certificate of title, which listed the sale date as June 18, 2006—the day *after* the accident. Titan believed that physical possession of the motorcycle was irrelevant. Additionally, Titan argued that there was no question that Shreve remained the *registrant* of the motorcycle and that State Farm was responsible for reimbursing PIP benefits under MCL 500.3114(5)(d). This Court denied Titan's motion. *Titan Ins Co v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered February 26, 2009 (Docket No. 282860).

The matter returned to the trial court and Curler was deposed on May 6, 2010. On July 27, 2010, Titan again filed a motion for summary disposition, arguing that while genuine issues of fact remained with regard to the ownership of the motorcycle at the time of the accident, there was no question that Shreve remained the "registrant" at the time of the accident because he had left his license plate on the motorcycle when he sold the motorcycle to Jay. After buying the motorcycle from Jay, Curler did not attempt to obtain a new plate until June 18, 2006—the day *after* the accident. Titan argued that the registration of Shreve's plate was never canceled and, therefore, Shreve remained the registrant under MCL 257.234.

State Farm argued that it, not Titan, was entitled to judgment as a matter of law because not only did Shreve testify that he no longer had an insurable interest in the

motorcycle, but Curler confirmed that the sale and transfer of the motorcycle and the title occurred well before the accident took place. Additionally, State Farm argued that Titan's claim that Shreve remained the registrant had been rejected by implication in the Court of Appeal's decision that reversed the order of the trial court and remanded the matter for further proceedings. State Farm argued that its liability for payment of PIP benefits was terminated upon Shreve's assignment and transfer of the title.

A hearing took place on August 30, 2010. After hearing arguments, the trial court stated:

> The Court is intrigued by *Clevenger* [*v Allstate Ins Co*, 443 Mich 646; 505 NW2d 553 (1993)]. But the problem in this case that we have is; well we don't have all the evidence. Because we don't have evidence from Shreve's deposition that he left the registration or proof of insurance with the motor vehicle, or the plate; that's something that, ah, *Clevenger* was talking about. So at this point and time we're actually speculating about what his interest is.
>
> And frankly I'm buying into State Farm's argument that that statue [sic] [MCL] 257.233(9) says the effective date of the transfer of interest in the motor vehicle is the date of signature, or the assignment of the certificate of title. So I vote for State Farm today.

The trial court denied Titan's subsequent motion for reconsideration, stating: "To put it succinctly, the Court of Appeals remanded the case back for the determination of two factual issues. First, what was the date the title was transferred? Second, to whom was it transferred?" The trial court noted that "even if this Court were to assume that [Shreve] left his plate on the motorcycle when he sold it to Mr. [Jay] Wilson, that single act does not rise to the standard provided by *Allstate* [*Ins Co v State Farm Mut Auto Ins Co*, 230 Mich App 434; 584 NW2d 355 (1998)] and *Clevenger*. In

Clevenger, in addition to leaving the plate on the vehicle, the seller also left the registration and the certificate of insurance in the vehicle." The trial court stated that because Shreve had testified that he had canceled the insurance on the motorcycle in March 2006, it was "highly improbable" that he intended to maintain an insurable interest. The trial court concluded that there was no genuine issue of material fact that Shreve no longer had an insurable interest in the motorcycle.

Titan again appeals as of right.

II. STANDARD OF REVIEW

A trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to ascertain whether the movant is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We review the record in a light most favorable to the nonmoving party to determine whether the evidence established the existence of a genuine issue of material fact for trial. *Id*. We review issues of law, including questions of statutory construction, de novo. *White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008).

This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). In so doing, the Court must begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). It is axiomatic that the words contained in the statute provide the most reliable evidence of the Legislature's intent. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184 (2007). The Legislature is presumed to have intended the meaning it plainly

expressed and clear statutory language must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007); *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Lash*, 479 Mich at 187; *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). Only if a statute is ambiguous is judicial construction permitted. *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

Apparently plain statutory language can be rendered ambiguous by its interaction with other statutes. *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 562; 710 NW2d 59 (2005). Statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998); *McNeil v Charlevoix Co*, 275 Mich App 686, 701; 741 NW2d 27 (2007), aff'd 484 Mich 69 (2009). The object of the *in pari materia* rule is to give effect to the legislative purpose as found in harmonious statutes. *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things. *Id*.

III. SHREVE'S STATUS AS "OWNER OR REGISTRANT"

Titan argues that, in allowing his license plate to remain on the motorcycle and in failing to cancel his registration, Shreve remained the motorcycle's "registrant." We agree.

MCL 500.3114(5), a subsection of the motor vehicle personal and property protection chapter of Michigan's Insurance Code, MCL 500.3101 *et seq.*, provides:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the *owner or registrant* of the motorcycle involved in the accident. [Emphasis added.]

There is no dispute that, at the time of the accident, Curler and the driver of the other vehicle involved in the accident were uninsured. At issue is whether, by leaving the plates on the motorcycle when he sold it to "Jay," Shreve remained the registrant of the motorcycle. Titan argues that the use of the disjunctive "or" requires a finding that Shreve's insurer, State Farm, was liable for the payment of PIP benefits. The Legislature is presumed to know the rules of grammar. *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Mgrs, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). While, generally, "or" is a disjunctive term indicating a choice between alternatives and "and" means in addition to, the terms are often misused. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009). Nevertheless, the words are not interchangeable and their literal meanings should be

followed if they do not render the statute dubious. *Id.* at 428-429; *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995).

The Insurance Code defines an "owner" as any of the following:

> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.
>
> (*iii*) A person who has the immediate right of possession of a motor vehicle under an installment sale contract. [MCL 500.3101(2)(h).]

Unfortunately, a "registrant" is not as clearly defined in the Insurance Code. In fact, it is only referred to in the negative. MCL 500.3101(2)(i) provides that a " '[r]egistrant' " does not include a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days."

Citing the Michigan Vehicle Code, MCL 257.1 *et seq.*, Titan argues that there are very limited ways in which to cancel a vehicle's registration. Registration automatically expires on the owner's birthday. MCL 257.226(1). A new registration is created only upon receipt by the Secretary of State of an endorsed certificate of title and application for transfer of registration. MCL 257.237(1). If a transfer does not occur within 15 days, the vehicle is considered to be without registration. MCL 257.234(3). If the owner transfers the title to the vehicle, he or she is required to remove the registration plates and transfer them, or

retain them for subsequent transfer, to another vehicle that the owner owns. MCL 257.233(1). Titan argues that Shreve continued to be the registrant because he did not remove the plate, did not transfer the plate to another vehicle that he owned, and did not transfer the plate to a family member. Additionally, there was no "deregistration" because 15 days had not elapsed between the time of the sale and the accident, nor did registration lapse upon Shreve's birthday, which occurred after the accident.

Rather than directly addressing whether Shreve remained the registrant, State Farm argues that Shreve did not maintain an "insurable interest" in the motorcycle, citing MCL 257.233(8) and (9), which, at the time in question,[1] provided:

> (8) The owner shall indorse on the certificate of title as required by the secretary of state an assignment of the title with warranty of title in the form printed on the certificate with a statement of all security interests in the vehicle or in accessories on the vehicle and deliver or cause the certificate to be mailed or delivered to the purchaser or transferee at the time of the delivery to the purchaser or transferee of the vehicle. The certificate shall show the payment or satisfaction of any security interest as shown on the original title.
>
> (9) Upon the delivery of a motor vehicle and the transfer, sale, or assignment of the title or interest in a motor vehicle by a person, including a dealer, the effective date of the transfer of title *or interest in the vehicle* shall be the date of execution of either the application for title or the assignment of the certificate of title. [Emphasis added.]

State Farm points out that the obligation to obtain a new certificate of title lies with the purchaser, not the seller, and that, by canceling the insurance and relin-

[1] MCL 257.233 was amended after the accident occurred.

quishing possession of the motorcycle and title thereto, Shreve had no remaining interest in the motorcycle after the sale. However, this argument does not address Shreve's status as a registrant.

Both parties cite *Clevenger v Allstate Ins Co*, 443 Mich 646; 505 NW2d 553 (1993). In *Clevenger*, Douglas Preece purchased his aunt's Pontiac for $100. The aunt, JoAnn Williams, signed her name to the certificate of title and gave the vehicle to Preece. Preece testified that because it was the weekend, Williams agreed that Preece could drive with her registration plate, registration, and insurance until Monday when the Secretary of State office opened. Thus, when Preece left Williams's home, the registration plate was attached to the vehicle and the certificates of registration and insurance were in the glove compartment. *Id.* at 648. Preece was involved in a head-on collision on the way home and the other driver, Clifford Clevenger, was injured. Clevenger received first-party personal injury protection benefits from his own insurer and then sued Williams's insurer, Allstate Insurance. Though Williams had canceled insurance on the vehicle, she did not do so until four days after the accident and at that time she was not aware that an accident had even taken place. *Id.* at 649. The trial court found that Allstate had a duty to defend and indemnify. This Court reversed, finding that a bona fide sale occurred, that Williams was no longer the owner of the vehicle, and that she was relieved of any liability. *Id.* at 650. Our Supreme Court reversed, rejecting the argument that because Williams no longer held title she no longer held an "insurable interest" in the car. The Court reiterated that the terms " 'owner' and 'registrant,' as used in the no-fault act, are not synonymous and represent separate categories of individuals." *Id.* at 658. Our Supreme Court held:

> We read these provisions of the vehicle code and the no-fault insurance act in pari materia as indicating that an unexpired registration plate affixed to the vehicle serves as presumptive evidence that the vehicle is validly registered with the Secretary of State, and that it carries the statutorily mandated no-fault automobile insurance. It logically follows that to destroy that presumption, the appropriate course of action after the sale of a vehicle is for the seller to remove the registration plate and the certificates of registration and insurance from the automobile. In this case, Mrs. Williams failed to do so. A reasonable inference can be made that Williams voluntarily remained the insuring registrant of the Pontiac, as evidenced by the testimony and by allowing Preece to take possession and operate the vehicle on a public highway with her plate attached and with her certificates of insurance and registration in the glove compartment. Moreover, Mrs. Williams' failure to retain title to the automobile did not excuse her compliance with any other legislative requirements she may have had under the no-fault insurance act. As the registrant of a vehicle she permitted to be operated upon a public highway, Mrs. Williams was required by the act to provide residual liability insurance on the vehicle under the threat of criminal sanctions. In this limited context, Mrs. Williams' insurable interest was not contingent upon title of ownership to the automobile but, rather, upon personal pecuniary damage created by the no-fault statute itself. Thus, we reject Allstate's argument that Mrs. Williams, as the registrant of the Pontiac, had no "insurable interest" in the vehicle because she was no longer the title holder. . . .
>
> In short, because she voluntarily remained the insuring registrant of the automobile, Mrs. Williams must be taken to have complied with the compulsory insurance statute whether she intended to or not. Our conclusion is supported by the overriding, strong public policy and the Legislature's mandate that vehicles not be operated on Michigan's highways without personal protection insurance, property protection insurance, and residual liability insurance. [*Id.* at 660-662 (citations omitted).]

The parties also cite *Allstate Ins Co v State Farm Mut Auto Ins Co*, 230 Mich App 434; 584 NW2d 355 (1998). In *Allstate*, the plaintiffs were husband and wife. The wife was injured when the car in which she was a passenger was struck by a Buick LaSabre driven by Bruce Walsh. Only hours before the accident, Walsh had purchased the car from Charles Hinton, Jr. Hinton not only turned over possession of the car to Walsh, but also provided a receipt of sale and removed his license plate, registration, and certificate of insurance from the car. *Id.* at 435. Walsh had placed his own license plate on the car, but had failed to obtain insurance. Allstate, the plaintiffs' insurer, denied coverage on the theory that Walsh was covered under Hinton's insurance through State Farm. State Farm argued that Hinton was "no longer the owner or registrant of the vehicle" once he removed the license plate, registration, and proof of insurance from the vehicle. *Id.* at 436. Allstate brought a declaratory judgment action to determine whether Allstate or State Farm was liable. The trial court granted summary disposition in favor of State Farm. *Id.* In affirming the trial court's order, this Court noted that "a 'named insured' must have an insurable interest to support a valid automobile liability insurance policy." *Id.* at 440. Unlike the seller of the vehicle in *Clevenger*, Hinton did nothing to intimate that he was voluntarily remaining the registrant of the car; rather,

> Hinton did exactly what the Supreme Court suggested a seller do; he removed his license plate, registration, and certificate of insurance from the vehicle before giving Walsh possession. These actions, in conjunction with the bona fide sale of the vehicle, destroyed Hinton's status as owner and as registrant. Unlike *Clevenger*, there simply are no facts from which we could infer that Hinton "voluntarily remained the insuring registrant." Thus, at the time of the accident, Hinton had no remaining interest in

> the vehicle, he had no insurable interest, and the State Farm liability policy covering the LeSabre was simply void. [*Id.* at 440-441.]

In a footnote, this Court further noted:

> Allstate argues that Hinton remained the registrant for an indefinite period after the sale. According to Allstate, in order to cast off his status as registrant, Hinton was required to cancel the registration with the Secretary of State or wait for the registration to expire. We find no authority for this proposition. Reading the applicable provisions of the vehicle code together, it is clear that the owner of a vehicle is responsible for registering it. See MCL 257.222-257.224; MSA 9.1922-9.1924 (instructing that the registration certificate and registration plate be delivered to the owner of the vehicle). If the owner transfers the title to the vehicle, she is required to remove the registration plates and transfer them, or retain them for transfer to another vehicle. MCL 257.233(1); MSA 9.1933(1). The code also makes it clear that the purchaser or transferee is responsible for obtaining a new certificate of title and registration certificate for the purchased vehicle. MCL 257.234; MSA 9.1934. However, the purchased vehicle is exempt from the registration and certificate of title provisions of the vehicle code for three days immediately following transfer of the title. MCL 257.216[*l*]; MSA 9.1916[*l*]. Implicit in this legislative scheme is the idea that a seller who complies with the statutory requirements by removing the registration plate, registration certificate, and certificate of insurance from the vehicle, is no longer a registrant of the vehicle. In *Clevenger*, the Supreme Court simply recognized that a person who transfers the title to a vehicle and allows the new owner to drive the vehicle away with her registration plate, registration certificate, and certificate of insurance, voluntarily remains the registrant of the vehicle. [*Id.* at 441 n 7.]

MCL 257.233(9) states that the "effective" date of transfer of the title or the interest in the vehicle is the date of "execution" of either the application for title or

the assignment of the certificate of title. Curler's testimony that he obtained title to the motorcycle days before the accident was in direct contrast with the documentary evidence, which indicated that the "purchase date" was June 18, 2006, one day after the accident. The date appears on both the certificate of title as well as the application for a Michigan vehicle title. It is unclear whether Shreve actually signed the certificate of title before the accident or after the accident. In any event, even if Shreve had signed the certificate of title without dating it on or about June 14, 2006, *Clevenger* compels a conclusion that Shreve remained the registrant of the motorcycle at the time of Curler's accident. While Shreve may have canceled his policy of insurance on the motorcycle, there is no evidence that the cancellation, which took place three months before the sale, was done in anticipation of the sale of the motorcycle; rather, it appears that Shreve canceled the policy merely because he had no intention to use the motorcycle at that time. Moreover, while Shreve apparently removed the certificates of registration and insurance from the motorcycle before he relinquished possession of the motorcycle, the fact remains that Shreve failed to remove his unexpired license plate from the motorcycle and, as such, "[a] reasonable inference can be made that [Shreve] voluntarily remained the insuring registrant . . . ." *Clevenger*, 443 Mich at 660-661. Shreve's insurer, State Farm, was therefore obligated to pay personal protection insurance benefits in this case.

Reversed. As the prevailing party, plaintiff may tax costs. MCR 7.219.

JANSEN, P.J., and WILDER and K. F. KELLY, JJ., concurred.

UNILOY MILACRON USA INC v DEPARTMENT OF TREASURY

Docket No. 300749. Submitted January 12, 2012, at Lansing. Decided January 26, 2012. Approved for publication March 29, 2012, at 9:00 a.m.

Uniloy Milacron USA Inc. brought an action in the Court of Claims against the Department of Treasury, seeking a refund of single business tax paid under protest for tax years 2003, 2004, and 2005. Uniloy manufactures molds at its manufacturing plant in MI. Uniloy Milacron, Inc. (UMI), an affiliate corporation, had a distributor agreement with Uniloy under which UMI would market Uniloy's products as well as purchase the products for resale. UMI solicited orders from customers for Uniloy's products and sent the orders to Uniloy for approval. Upon approval, Uniloy would package, load, and ship the products directly to customers, the majority of which were outside Michigan. UMI never obtained possession of the products, but title in the products did transfer from Uniloy to UMI at some point. When Uniloy prepared its Michigan single business tax returns for the specified years it sourced its sales for purposes of computing its sales-apportionment factor based on the destination to which its products were shipped or delivered to a customer. The department conducted an audit and allocated all of Uniloy's sales to Michigan for purposes of the sales-apportionment factor. The court, Paula J. Manderfield, J., concluded that all Uniloy's sales could not be apportioned to Michigan and granted summary disposition in favor of Uniloy. The department appealed.

The Court of Appeals *held*:

The former Single Business Tax Act (SBTA), MCL 208.1 *et seq*., was a value-added tax that measured the increase in value of goods and services brought about by whatever a business had done to them between the time of purchase and time of sale. Under former MCL 208.45 a formula involving three ratios—the property factor, the payroll factor, and the sales factor—was used to apportion taxing authority for goods and services between two taxing states and calculate the adjusted tax base, which was then used to calculate the single business tax liability. The Court of Claims properly determined that all of Uniloy's sales could not be appor-

tioned to Michigan for calculation of tax liability under the SBTA. Under former MCL 208.52(b), Uniloy's sales could be sourced to Michigan for purposes of the sales factor calculation only if the product was delivered or shipped to a customer in Michigan. Uniloy's employees never took possession of the products and were never involved in the packaging, loading, and shipping of the products. The sale of products to UMI for resale, without evidence of shipment and delivery to UMI, was not sufficient to apportion that sale to Michigan for purposes of single business tax liability. If the Legislature had intended that a sale of tangible personal property be sourced on the basis of where the sale occurred, it would have included language in the SBTA to that effect.

Affirmed.

TAXATION — SINGLE BUSINESS TAX — APPORTIONMENT FACTOR — SALES FACTOR.

Under MCL 208.45 of the former Single Business Tax, a formula involving three ratios—the property factor, the payroll factor, and the sales factor—was used to apportion taxing authority for goods and services between two taxing states and calculate the adjusted tax base, which was then used to calculate the single business tax liability; under former MCL 208.52(b) sales of tangible personal property could be sourced to Michigan for purposes of calculating the sales factor only if the product had been shipped or delivered to a customer within Michigan; the sale of property would not be sourced on the basis of where the sale occurred.

Honigman Miller Schwartz & Cohn LLP (by *Patrick R. Van Tiflin* and *Daniel L. Stanley*) for Uniloy Milacron USA, Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Bruce C. Johnson*, Assistant Attorney General, for the Department of Treasury.

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM. In this case involving the Single Business Tax Act[1] (SBTA), former MCL 208.1 *et seq.*, defendant, the Department of Treasury, appeals the Court of

[1] The SBTA has been repealed. *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 679 n 1; 741 NW2d 579 (2007); see 2006 PA 325. To

Claims's order granting summary disposition under MCR 2.116(C)(10) in favor of plaintiff, Uniloy Milacron USA, Inc. We affirm.

I

Plaintiff manufactures molds used in blow molding machines. Its manufacturing plant is in Tecumseh, Michigan. Plaintiff entered into a distributor agreement with an affiliate corporation: Uniloy Milacron, Inc. (UMI). Under the distributor agreement, plaintiff and UMI agreed that UMI would market plaintiff's products as well as purchase plaintiff's products for resale. UMI solicited orders from customers for plaintiff's products and sent the orders to plaintiff for approval. Upon approval, plaintiff's personnel would package, load, and ship the products directly to the customers. The "vast majority" of the products were shipped to customers outside Michigan. UMI never obtained possession of the products. Although both plaintiff and defendant agree that title in the products transferred from plaintiff to UMI at some point before the customers acquired the products, the distributor agreement was silent with respect to the transfer of title.

When it prepared its Michigan single business tax (SBT) returns for the 2003, 2004, and 2005 tax years, plaintiff sourced its sales for purposes of computing its sales factor "based on the destination to which its products were shipped or delivered to a customer." When defendant audited plaintiff for these tax years, defendant determined that all of plaintiff's sales were Michigan sales for purposes of the sales factor used in calculating the taxes and, thus, assessed plaintiff an

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make the text of the opinion easier to read, references to SBTA provisions are to the version in effect at the time the tax was imposed

additional $28,558.67 in single business taxes and interest. Plaintiff paid the assessment under protest.

Plaintiff sued defendant in the Court of Claims to obtain a refund. Plaintiff moved for partial summary disposition under MCR 2.116(C)(10) (no genuine issue of a material fact), and defendant responded, requesting that the court grant summary disposition in defendant's favor under MCR 2.116(I)(2) (nonmoving party entitled to judgment). After a hearing, the court granted plaintiff's motion for summary disposition, denied defendant's motion, and entered judgment for plaintiff in the amount of $28,558.67, plus statutory interest.

II

The sole issue before this Court is whether the Court of Claims erred when it determined that all of plaintiff's sales could not be apportioned to Michigan as a matter of law and, thus, granted summary disposition in favor of plaintiff. We conclude that it did not.

We review de novo a trial court's determination of a motion for summary disposition under MCR 2.116(C)(10). *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable" to the nonmoving party. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Resolution of this appeal also involves the interpretation of statutory language, which we review de novo. *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491, 494; 794

NW2d 357 (2010). "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent." *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 276; 621 NW2d 233 (2000). The specific language of the statute must be examined to determine the Legislature's intent because the Legislature is presumed to have intended the meaning it plainly expressed. *Id.* at 276-277. "Where the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 648; 732 NW2d 116 (2007). "A provision is ambiguous if it is susceptible to more than a single meaning or if it irreconcilably conflicts with another provision." *TMW Enterprises, Inc v Dep't of Treasury*, 285 Mich App 167, 172; 775 NW2d 342 (2009).

III

Michigan's repealed SBT was a value-added tax that "measure[d] the increase in value of goods and services brought about by whatever a business does to them between the time of purchase and time of sale." *Guardian Photo*, 243 Mich App at 277. Any person engaged in business activity in Michigan was subject to the SBT because the SBT was a tax on economic activity, not an income tax. *TMW*, 285 Mich App at 173. The SBTA provided a formula for the apportionment between two taxing states through a calculation involving three ratios: the property factor, the payroll factor, and the sales factor. *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 717; 697 NW2d 539 (2005), rev'd in part on other grounds 477 Mich 170 (2007); see also MCL 208.45. The formula was used in a calculation to determine the adjusted tax base, which was then used to calculate the SBT liability. *Fluor*, 265 Mich App at 717. The dispute in this

case involves how plaintiff's sales factor was calculated using the amount of sales sourced to Michigan.

The sales factor was a fraction with the numerator being the "the total sales of the taxpayer in this state during the tax year" and the denominator being "the total sales of the taxpayer everywhere during the tax year." MCL 208.51. MCL 208.52 addressed when a sale of tangible personal property was sourced to Michigan and stated in pertinent part:

> Sales of tangible personal property are in this state in any of the following circumstances:
>
> * * *
>
> (b) For tax years beginning on and after January 1, 1998, the property is shipped or delivered to any purchaser within this state regardless of the free on board point or other conditions of the sales.

We conclude that MCL 208.52(b) was not ambiguous; therefore, we must enforce it as written. See *Ammex*, 273 Mich App at 648. The SBTA did not define "shipped" or "delivered." MCL 208.2 provided that "terms not defined within the SBTA are to be accorded 'the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes.' " *Consumers Power Co v Dep't of Treasury*, 235 Mich App 380, 385; 597 NW2d 274 (1999). However, the Internal Revenue Code lacks standard definitions for "shipped" and "delivered"; thus, for further guidance this Court may consult a dictionary for their definitions. See *id.*; see also *TMW*, 285 Mich App at 172 (explaining that if a statute does not define a term, this Court may consult a dictionary to afford a statutory term its plain and ordinary meaning). *Random House Webster's College Dictionary* (2001) defines "deliver" as "to carry and turn over . . . to the intended

recipient or recipients," "to give into another's possession or keeping," to "hand over," and to "surrender." The dictionary defines "ship" as "to send or transport by ship, rail, truck, plane, etc." or "to send away." *Id.*

Accordingly, under MCL 208.52(b), a sale by plaintiff would have been sourced to Michigan for purposes of the sales factor only if plaintiff's product was "carried and turned over," "handed over," "surrendered," "sent away," or "transported" to a customer within Michigan. In this case, there is no documentary evidence to support defendant's assertion that the products were shipped or delivered by plaintiff to UMI. Neither UMI nor its employees took possession of the products, and they were not involved in the packaging, loading, and shipping of the products. Rather, the undisputed evidence demonstrates that plaintiff's employees loaded the product onto common carriers for delivery to UMI's customers.

Defendant insists that the products were necessarily delivered to UMI, arguing that the products "were made in Michigan and were shipped from Michigan, and were never anywhere else before they were shipped to UMI's customers, [so] logically, [plaintiff] must have delivered the [products] to UMI in Michigan, however that delivery took place." We reject this argument. Just because plaintiff sold the products to UMI does not necessarily mean that plaintiff shipped or delivered the products to UMI, and defendant has not provided this Court with any legal authority to support such a conclusion. Plaintiff's sales were not sourced to Michigan merely because plaintiff sold its products to UMI in Michigan for resale. See MCL 208.52(b). Had the Legislature intended a sale of tangible personal property to be sourced on the basis of where the sale occurred, it would have included language in the SBTA to that

effect; we will not read words into the plain language of an unambiguous statute. *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 410-411; 809 NW2d 669 (2011); see also *Kurz v Mich Wheel Corp*, 236 Mich App 508, 512-513; 601 NW2d 130 (1999).

Defendant also argues that the Court of Claims improperly relied on a draft revenue administrative bulletin (RAB) issued by defendant that interpreted the current Michigan Business Tax Act, MCL 208.1101 *et seq*. We disagree. An RAB is "issued under MCL 205.3(f), which allows defendant to issue bulletins that index and explain current department interpretations of current state tax laws." *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 46; 706 NW2d 460 (2005) (quotation marks and citation omitted). In this case, the Court of Claims did discuss RAB 2010-XX—and authority from other jurisdictions regarding similar statutory schemes—and reasoned that the RAB contradicted defendant's position in the instant case. While we acknowledge that an RAB is only an interpretation of a statute and does not have the force of law, *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004), we note that the Court of Claims did as well, opining that the RAB was merely "persuasive." Moreover, even assuming that the Court of Claims afforded the RAB undue weight, we do not reverse because the court's conclusion in this case was consistent with the plain language of MCL 208.52(b). See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) ("[W]e will not reverse the court's order when the right result was reached for the wrong reason.").

Affirmed.

BECKERING, P.J., and OWENS and SHAPIRO, JJ., concurred.

In re APPLICATIONS OF DETROIT EDISON COMPANY

Docket Nos. 296374 and 296379. Submitted October 4, 2011, at Lansing. Decided April 10, 2012, at 9:00 a.m.

Detroit Edison Company filed applications in the Public Service Commission (PSC), requesting authority to realign retail electric rates for Michigan educational institutions to recover the resultant revenue shifts to other customer classes and a rate increase above the established retail electric base rates. In addition, Detroit Edison requested that the PSC continue the company's choice incentive mechanism (CIM), its storm-restoration expense recovery mechanism, and the line-clearance expense recovery mechanism, authorize the implementation of an uncollectible expense true-up mechanism (UETM), approve a revenue decoupling mechanism (RDM), and approve its proposal to amend or extend certain retail electric rate schedules. The Association of Businesses Advocating Tariff Equity (ABATE) and the Attorney General intervened. Following an evidentiary hearing, the PSC authorized Detroit Edison to adopt an RDM, authorized Detroit Edison to include $39,858,000 in funding for the Low-Income and Energy Efficiency Fund (LIEEF) as an operation and maintenance expense, approved four single cost tracking mechanisms, and approved funding for Detroit Edison to pursue a plan to upgrade its meters. ABATE and the Attorney General appealed separately.

The Court of Appeals *held*:

1. An administrative agency's powers are limited to those granted by the Legislature by clear and unmistakable language. Although MCL 460.1089(6) mandates that qualified natural gas providers may use an RDM to adjust for sales volumes above or below the projected levels, MCL 460.1097(4) does not mandate or authorize the use of an RDM by electricity providers. Rather, MCL 460.1097(4) mandates research and reporting on how RDMs would operate in connection with electricity providers. The PSC did not have authority to authorize Detroit Edison's adoption of an RDM.

2. PSC regulated utilities are not required to raise money for the LIEEF because its enabling legislation was deleted from the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*. The PSC does not have authority under the general regulatory

powers provided in MCL 460.6a(2) to approve a utility's collecting money from its ratepayers as an operation and maintenance expense to fund a program to help ratepayers who have difficulty paying their energy bills or to administer a program to promote energy efficiency in general. The PSC erred by approving Detroit Edison's petition to collect nearly $40 million in LIEEF funding from its customers because Detroit Edison lacked statutory authority to collect money for such a purpose.

3. Retroactive ratemaking is prohibited without statutory authorization, but it does not occur if only future rates are affected with no adjustment to previously set rates. The PSC may use the accounting convention by which storm-related expenses from one year are characterized as expenses incurred in subsequent years to which they were deferred. The PSC had authority to approve Detroit Edison's request to extend previously approved trackers for storm and nonstorm restoration expenses and a line-clearance expense mechanism, to adopt a UETM, and to continue a CIM. The PSC correctly approved Detroit Edison's use of tracking mechanisms though which future rates are adjusted to take account of actual past expenses.

4. The PSC may allow recovery of a utility's costs only when the utility proves that recovery of the costs is just and reasonable. The PSC erred by approving a nearly $37 million rate increase to fund Detroit Edison's advanced metering infrastructure (AMI) program, which involved so-called "smart meters" to collect real-time energy consumption data, because the decision was not supported by competent, material, and substantial evidence on the whole record. The AMI program was commercially untested and highly capital intensive, with a potential for significant economic risk and substantial impact on rates. Detroit Edison failed to present evidence regarding a cost-benefit analysis of the program or its necessity, as well as the availability of other competing considerations. Even though Detroit Edison characterized the program as experimental, an abuse-of-discretion standard of review was not appropriate, regardless of the difficulty with establishing a cost-benefit analysis for a pilot program. Remand was necessary for the PSC to conduct a full hearing on the program.

5. The Legislature intends specificity in a statute when the language is specific and silence when it is silent. Under MCL 460.11(1), as amended by 2008 PA 286, the cost of providing electricity to customers is calculated by an allocation formula of 50 percent weighting of peak demand, 25 percent weighting of on-peak energy use, and 25 percent weighting of total energy use. Because the Legislature specified the 50-25-25 weighting formula

with no indication about how the components should be calculated, the Legislature intended to prescribe the weighting formula while leaving the PSC and the utilities to determine which formula to use to calculate the individual components in the normal course of business. Thus, the PSC properly allowed Detroit Edison to calculate the peak demand component by using the MH4CP method, as opposed to using the 12CP method that was in effect when MCL 460.11(1) was amended and the weighting formula was set.

Affirmed in part, reversed in part, and remanded for further proceedings.

SHAPIRO, P.J., concurring in part and dissenting in part, agreed with the majority that the PSC did not have authority to allow rate decoupling. The AMI program was experimental, so an abuse-of-discretion standard of review applied and Judge SHAPIRO would have affirmed the PSC's decision to approve Detroit Edison's AMI program because it was not arbitrary and capricious. Judge SHAPIRO concurred with the majority on all other issues.

1. PUBLIC UTILITIES — ELECTRIC UTILITIES — RATE-DECOUPLING MECHANISM — PUBLIC SERVICE COMMISSION — AUTHORITY TO ORDER RATE DECOUPLING.

The Public Service Commission does not have authority to approve or direct the use of a rate-decoupling mechanism by electric providers to adjust for sales volumes above or below projected levels (MCL 460.1097[4]).

2. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — LOW-INCOME AND ENERGY EFFICIENCY FUND — SOURCE OF FUNDING.

Utilities regulated by the Public Service Commission (PSC) are not required to raise money for the Low-Income and Energy Efficiency Fund because its enabling legislation was deleted from the Customer Choice and Electric Reliability Act, MCL 460.10 *et seq*.; under its general regulatory powers provided in MCL 460.6a(2), the PSC does not have authority to approve a utility's collecting money as an operation and maintenance expense from its ratepayers to fund a program to help ratepayers who have difficulty paying their energy bills or to administer a program to promote energy efficiency in general.

3. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — EXPERIMENTAL PROGRAMS — STANDARD OF REVIEW.

The Public Service Commission's approval of a utility's experimental program is not reviewed for an abuse of discretion; rather, recovery of the experimental program's costs must be just and reasonable and the commission's approval must be supported by

competent, material, and substantial evidence on the whole record; competing program considerations, the necessity of the program, and an analysis of the cost of the program versus the net benefit to the customer must all be considered.

4. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — ELECTRIC RATES — COST-ALLOCATION FORMULA — COMPUTATION OF COMPONENTS.

Under MCL 460.11(1), electricity providers must calculate the cost of providing service to each customer class through the allocation of production-related and transmission costs on the basis of a weighted formula of 50 percent peak demand, 25 percent on-peak energy use, and 25 percent total energy use; because the Legislature specified the 50-25-25 weighting formula but was silent about how the individual components should be calculated, the Public Service Commission has authority in the normal course of business to determine how those components are calculated.

Clarke Hill PLC (by *Robert A. W. Strong*) for the Association of Businesses Advocating Tariff Equity.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Steven D. Hughey*, *Kristin Smith*, *Spencer A. Sattler*, and *Anne M. Uitvlugt*, Assistant Attorneys General, for the Public Service Commission.

Fahey Schultz Burzych Rhodes PLC (by *Stephen J. Rhodes* and *William K. Fahey*), *Bruce R. Maters*, *Jon P. Christinidis*, *Richard P. Middleton*, and *Michael J. Solo, Jr.*, for The Detroit Edison Company.

Bill Schuette, Attorney General, *S. Peter Manning*, Division Chief, and *Donald E. Erickson*, Assistant Attorney General, for the Attorney General.

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

SAAD, J. In these consolidated appeals, appellants, the Association of Businesses Advocating Tariff Equity (ABATE) and the Attorney General, appeal the January

11, 2010, opinion and order of the Public Service Commission (PSC). For the reasons set forth, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

The PSC's opinion and order contains the following statement of facts:

> On January 5, 2009, The Detroit Edison Company . . . filed an application in Case No. U-15751 requesting authority to realign retail electric rates for Michigan educational institutions in accordance with the requirements of Section 11(4) of 2008 PA 286 (Act 286) [MCL 460.11(4)]. Detroit Edison stated that realigning rates for educational institutions necessarily shifts revenues to other customer classes. In its application, Detroit Edison requested to immediately implement surcharges to recover that revenue shift, or in the alternative, that the Commission authorize surcharges to recover that revenue shift, or in the alternative, that the Commission authorize establishment of a regulatory asset to account for the revenue shift.[1]
>
> On January 26, 2009, Detroit Edison filed an application in Case No. U-15768 requesting a $378 million rate increase above the retail electric base rates established in the December 23, 2008 and January 13, 2009 orders in Case No. U-15244 and pursuant to various special contracts approved by the Commission. Detroit Edison asserted that its request for rate relief was based on July 2009 through June 2010 test year data that establishes a need for additional revenue to cover environmental compliance costs; the costs associated with the operation and maintenance of the company's electric distribution system and generation plants; the costs associated with customer uncollectible accounts; the costs associated with inflation; the capital costs associated with the addition of plant; and to recognize the reduction in territory sales.
>
> In addition, Detroit Edison requested that the Commission continue the company's choice incentive mechanism

(CIM), its storm restoration expense recovery mechanism, and the line clearance expense recovery mechanism, with some modifications. Detroit Edison also requested Commission authorization to implement an uncollectible expense true-up [or tracking] mechanism (UETM), and requested that the Commission approve a revenue decoupling mechanism (RDM) proposed by the company. Detroit Edison requested that the Commission approve its proposal to amend or extend certain retail electric rate schedules, including its economic development tariff.

* * *

According to Detroit Edison, under its current rate structure, full-service commercial and industrial (C&I) customers pay rates that are in excess of their cost of service while residential customers pay rates that are less than their cost of service. Detroit Edison notes that the Commission addressed this inequity in its December 23, 2008 order in Case No. U-15244, by ordering an immediate partial realignment of residential rates and by ordering annual rate realignments over a period of five years. Detroit Edison states that the rates proposed in this filing reflect the realignment ordered by the Commission for 2008.

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[1] On February 3, 2009, the Commission issued an order in Case No. U-15751 in which it directed that all issues related to Detroit Edison's educational tariff filing should be addressed in Case No. U-15768.

Ultimately, the PSC issued an opinion and order that authorized Detroit Edison to adopt an RDM, allowed Detroit Edison to include $39,858,000 in funding for the Low-Income and Energy Efficiency Fund (LIEEF) as an operation and maintenance expense, approved four single cost tracking mechanisms intended to adjust future rates to make up for any difference between the amount for a particular item included in base rates and the actual cost experienced by the utility, and approved

funding for Detroit Edison to pursue a plan to upgrade its meters. ABATE also challenges the PSC's decision to change its methodology for calculating the peak-demand component for purposes of allocating production-related and transmission costs to customer classes in accord with a statutory formula.

II. STANDARD OF REVIEW

As this Court explained in *In re Application of Michigan Consol Gas Co to Increase Rates*, 293 Mich App 360, 365; 810 NW2d 123 (2011):

> All rates, fares, charges, classifications, joint rates, regulations, practices, and services prescribed by the PSC are presumed prima facie to be lawful and reasonable. MCL 462.25; see also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635–636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of showing by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).
>
> A final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). A reviewing court gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).
>
> Issues of statutory interpretation are reviewed de novo. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference. *Id.* at 108.

Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. RATE DECOUPLING MECHANISM

We hold that the PSC exceeded its statutorily granted authority when it authorized Detroit Edison to adopt an RDM.

For purposes of this appeal, appellants do not dispute the policy objectives or expected consequences of Detroit Edison's adoption of an RDM, nor is it the judiciary's province to examine them. Rather, appellants correctly take issue with the PSC's authority to authorize the RDM in the first instance. Appellants point to the obvious differences in statutes addressing the use of RDMs for gas and electric utilities and reason, correctly in our view, that those differences mean that the PSC has authority to direct or approve the use of RDMs only in connection with gas utilities, not electric.

MCL 460.1089(6) states:

The commission shall authorize a natural gas provider that spends a minimum of 0.5% of total natural gas retail sales revenues, including natural gas commodity costs, in a year on commission-approved energy optimization programs to implement a symmetrical revenue decoupling true-up mechanism that adjusts for sales volumes that are above or below the projected levels that were used to determine the revenue requirement authorized in the natural gas provider's most recent rate case. In determining the symmetrical revenue decoupling true-up mechanism utilized for each provider, the commission shall give deference to the proposed mechanism submitted by the provider. The commission may approve an alternative mechanism if the commission determines that the alternative mechanism is reasonable and prudent. The commission shall authorize the natural gas provider to decouple

> rates regardless of whether the natural gas provider's energy optimization programs are administered by the provider or an independent energy optimization program administrator . . . .

This provision mandates the use of an RDM in connection with qualified natural gas providers. In contrast, MCL 460.1097(4) provides:

> Not later than 1 year after the effective date of this act, the commission shall submit a report on the potential rate impacts on all classes of customers if the electric providers whose rates are regulated by the commission decouple rates. The report shall be submitted to the standing committees of the senate and house of representatives with primary responsibility for energy and environmental issues. The commission's report shall review whether decoupling would be cost-effective and would reduce the overall consumption of fossil fuels in this state.

This latter provision mandates *research and reporting on how RDMs would operate in connection with providers of electricity*, but does not call for or authorize actual implementation of an RDM by those utilities. At issue, therefore, is whether the PSC is empowered to approve or direct the use of an RDM without specific statutory authorization. We read the statutes to answer this question in the negative.

As with other administrative agencies, the PSC possesses only that authority granted to it by the Legislature. *Attorney General v Pub Serv Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). Authority must be granted by clear and unmistakable language, and so the wording in the PSC's enabling statutes must be read narrowly and in the context of the entire statutory scheme. *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155-159; 596 NW2d 126 (1999). As this Court recently noted in *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582; 810 NW2d 110 (2011),

> [t]he powers of administrative agencies are . . . inherently limited. Their authority must hew to the line drawn by the Legislature. Our Supreme Court has repeatedly stressed the importance of this limitation on administrative agencies, stating that " '[t]he power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.' " *Mason* [*Co Civic Research Council v Mason Co*], 343 Mich [313, 326–327; 72 NW2d 292 (1955)] (citation omitted).

It is our judgment that a plain reading of MCL 460.1097(4) does not empower the PSC to approve or direct the use of an RDM for electric providers. If the Michigan Legislature had wanted to do so, it is plain from the language applicable to gas utilities in MCL 460.1089(6) that it could and would have made its intention clear. Accordingly, we reverse the PSC's decision to authorize Detroit Edison to adopt a rate decoupling mechanism because in doing so it exceeded its powers.

IV. LOW-INCOME AND ENERGY EFFICIENCY FUND

We further hold that the PSC erred when it ordered that Detroit Edison may include $39,858,000 in funding for the LIEEF as an operation and maintenance expense. This Court ruled in *Mich Consol Gas Application*, 293 Mich App at 368, that the Legislature's

> deletion of all references to the LIEEF from the Customer Choice and Electricity Reliability Act[1]—whose now-deleted provisions were recognized as the fund's enabling legislation in the first instance—indicates a legislative intent to withdraw any obligation, or prerogative, on the part of PSC-regulated utilities to raise money for that fund. [Citation omitted.]

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[1] MCL 460.10 *et seq*.

This Court further held that the PSC's general regulatory powers under MCL 460.6a(2) do not include the authority "to approve of a utility's collecting funds from its ratepayers in general to fund a program designed to offer some protection against interruptions in services, or other such relief, to distressed ratepayers" or to administer "a program to promote energy efficiency in general." *Id.* at 369.

The PSC cites MCL 460.10s to support its argument that the LIEEF remains a going concern. MCL 460.10s provides:

> The commission shall monitor the extent to which federal funds are available for low-income and energy assistance programs. If there is a reduction in the amount of the federal funds available to residents in this state, the commission shall conduct a hearing to determine the amount of funds available and the need, if any, for supplemental funding. Upon completion of the hearing, the commission shall prepare a report and submit it to the governor and the legislature.

This section, added to the Customer Choice and Electricity Reliability Act by 2000 PA 141, establishes the PSC's duty to monitor and evaluate federal funding for LIEEF programs, but neither creates a LIEEF nor even refers to any such fund in existence.

Further, while appropriations for the LIEEF may suggest "the Legislature's intention that the LIEEF continue to exist," the deletion of the enabling legislation indicates an intention to remove any duty or right of Detroit Edison to raise money for this purpose as an operation and maintenance expense. *Mich Consol Gas Application*, 293 Mich App at 368. As the Attorney General argues, "[a] court should not interpret an appropriations act as authorizing an administrative agency to generate money for a fund." This is because

" '[n]o appropriation shall be a mandate to spend.' " *Co Rd Ass'n v Governor*, 474 Mich 11, 15; 705 NW2d 680 (2005), quoting Const 1963, art 5, § 20.

Thus, to the extent that the LIEEF may exist, the deletion of the enabling legislation from MCL 460.10d left the PSC and PSC-regulated utilities without authorization to include revenue for the LIEEF as a cost to be borne by ratepayers, the utility users. Accordingly, we reverse the PSC's order insofar as it approved nearly $40 million in LIEEF funding to come from Detroit Edison's customers.[2]

V. TRACKING MECHANISMS

We hold that the PSC did not exceed its authority by approving Detroit Edison's use of tracking mechanisms through which future rates are adjusted to take account of actual past expenses.

At issue is the PSC's approval of Detroit Edison's request to extend previously approved trackers for storm and nonstorm restoration expenses and for a line-clearance expense mechanism, to adopt a UETM, and to continue a CIM.

As this Court explained in *In re Application of Mich Consol Gas Co*, "[r]etroactive ratemaking in utility cases is prohibited, absent statutory authorization." *Mich Con-*

[2] We note that after this Court released its decision in *Mich Consol Gas Application*, the Michigan Legislature passed legislation to replace the LIEEF with the vulnerable household warmth fund, which will assist low-income customers with their heating bills this winter. MCL 460.9q, as amended by 2011 PA 274. Again, our observation regarding the Legislature's role in making policy with respect to an RDM is equally applicable to the LIEEF. Michigan's Legislature is the appropriate constitutional body to make policy, and it is has now exercised that power in clear and unmistakable language, which thus provides the administrative agency, the PSC, the requisite authority to implement the Legislature's policy directive.

sol Gas Application, 293 Mich App at 366, citing *Mich Bell Tel Co v Pub Serv Comm*, 315 Mich 533, 547, 554–555; 24 NW2d 200 (1946). As in *Mich Consol Gas Application*, 293 Mich App at 366, the Attorney General "argues that use of the challenged tracking mechanism runs afoul of that principle." However, "retroactive ratemaking does not occur if only future rates are affected, with no adjustment to previously set rates." *Id*., citing *Attorney General v Pub Serv Comm*, 262 Mich App 649, 655, 658; 686 NW2d 804 (2004).

This Court has approved the PSC's decision to authorize the use of a CIM, along with a tree-trimming/forestry tracker. *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 114-115; 804 NW2d 574 (2010). In doing so, this Court reaffirmed the PSC's use of "the accounting convention whereby storm-related expenses dating from one year [are] characterized as expenses incurred in the subsequent years to which they were deferred." *Id*. at 114, citing *Attorney General*, 262 Mich App at 658. In *Mich Consol Gas Application*, 293 Mich App at 366-367, this Court also approved a utility's use of a UETM of the kind at issue here. As noted in that case, this Court has also approved a UETM in connection with another utility in 2008,

> on the ground that 'the UETM, designed to defer . . . the difference between the initially projected and the actual uncollectible expenses for a given period to a future year, does not involve retroactive ratemaking because the deferred expense is deemed an expense of the year to which it is deferred and, thus, is recovered on a prospective basis.' [*Id*., quoting *In re Application of Mich Consol Gas Co*, 281 Mich App 545, 549; 761 NW2d 482 (2008).]

It is thus well settled that the PSC may authorize the utilities it regulates to use UETMs, appellants' re-

peated challenges notwithstanding. Accordingly, our caselaw confirms that the PSC correctly approved Detroit Edison's use of tracking mechanisms through which future rates are adjusted to take account of actual past expenses.

VI. ADVANCED METERING INFRASTRUCTURE PROGRAM

We agree with appellants that the PSC erred by approving funding for Detroit Edison's advanced metering infrastructure (AMI) program. The PSC describes AMI as "an information-gathering technology that allows Detroit Edison to collect real-time energy consumption data from its customers." As ABATE explains, "[t]he so-called 'smart meters' allow the utility to remotely monitor and shut-off electricity to customers that have these meters installed." According to ABATE, the intention appears to be to "allow customers to access real time energy consumption data and make alterations in their energy consumption patterns in order to reduce their own costs and to reduce the demands placed upon the system at time of system peak." However, appellants have established that the PSC's decision to approve the nearly $37 million rate increase to fund the program was unreasonable because it was not supported by " 'competent, material, and substantial evidence on the whole record.' " *In re Consumers Energy Co Application*, 279 Mich App 180, 188; 756 NW2d 253 (2008) (citation omitted); see also MCL 24.306(d).

What the record does reveal is that AMI is a pilot program that even Robert Ozar, manager of the Energy Efficiency Section in the Electric Reliability Division of the PSC, concedes "is as yet commercially untested and highly capital intensive, resulting in the potential for significant economic risk and substantial rate impact."

At best, the actual evidence presented by Detroit Edison to support the rate increase was aspirational testimony describing the AMI program in optimistic but speculative terms. What the record sadly lacks is a discussion of competing considerations regarding the program or the necessity of the program and its costs as related to any net benefit to customers.[3] Though Detroit Edison and the PSC urge us to adopt an abuse-of-discretion standard of review because it characterizes AMI as "experimental," we decline to do so. While we appreciate that a cost-benefit analysis for a pilot program may be more difficult to establish with record evidence, this inherent difficulty does not permit the PSC to authorize millions of dollars in rate increases without an informed assessment supported by competent, material, and substantial evidence.

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[3] We take judicial notice that, on January 12, 2012, the PSC issued an order opening a docket to investigate the use of smart meters by electric utilities in Michigan. Case No. U-17000. The order states that its purpose is to address concerns raised by customers and municipalities and to "increas[e] the Commission's and the public's understanding of smart meters . . . ." To that end, the PSC ordered all regulated electric utilities to provide much the same information we find lacking here, including

> (1) The electric utility's existing plans for the deployment of smart meters in its service territory; (2) The estimated cost of deploying smart meters throughout its service territory and any sources of funding; (3) An estimate of the savings to be achieved by the deployment of smart meters; (4) An explanation of any other non-monetary benefits that might be realized from the deployment of smart meters; (5) Any scientific information known to the electric utility that bears on the safety of the smart meters to be deployed by that utility; (6) An explanation of the type of information that will be gathered by the electric utility through the use of smart meters; (7) An explanation of the steps that the electric utility intends to take to safeguard the privacy of the customer information so gathered; (8) Whether the electric utility intends to allow customers to opt out of having a smart meter; and (9) How the electric utility intends to recover the cost of an opt out program if one will exist.

Moreover, we will not rubber-stamp a decision permitting such a substantial expenditure—a cost to be borne by the citizens of this state—that is not properly supported. Were we to do so, we would abdicate our judicial review obligations. Again, the PSC may allow recovery of a utility's costs only when the utility proves that recovery of the costs is just and reasonable. On the record before the PSC and, perforce, before us, the PSC's decision was erroneous. Accordingly, we remand this matter for the PSC to conduct a full hearing on the AMI program, during which it shall consider, among other relevant matters, evidence related to the benefits, usefulness, and potential burdens of the AMI, specific information gleaned from pilot phases of the program regarding costs, operations, and customer response and impact, an assessment of similar programs initiated here or in other states, risks associated with AMI, and projected effects on rates. In other words, a real record, with solid evidence, should support whatever decision the PSC makes on remand.

VII. PEAK DEMAND

We hold that the PSC correctly reconsidered the question of how to best compute peak demand and elected to return to the system whereby peaks for all twelve months are taken into account.

The Customer Choice and Electricity Reliability Act, as amended by 2008 PA 286, includes the following provision, effective January 1, 2009:

> Except as otherwise provided in this subsection, the commission shall phase in electric rates equal to the cost of providing service to each customer class over a period of 5 years from the effective date of the amendatory act that added this section. . . . The cost of providing service to each customer class shall be based on the allocation of

> production-related and transmission costs based on using the 50-25-25 method of cost allocation. The commission may modify this method to better ensure rates are equal to the cost of service if this method does not result in a greater amount of production-related and transmission costs allocated to primary customers. [MCL 460.11(1).]

The PSC reported that in Detroit Edison's most recent general rate case, all parties agreed that "the allocation formula mandated by the Legislature should be understood to consist of a 50% weighting of peak demand, a 25% weighting of on-peak energy use, and a 25% weighting of total energy use." The PSC further noted that the statute does not specify the peak-demand component, and that the statute has the effect of shifting the weighting of peak demand halfway back to where it had been before 2005. At issue is the PSC's decision to change the method of calculating peak demand from "MH4CP" to a method used before, "12CP."

"MH4CP" stands for "multihour 4 coincident peak" and is based on peak demands in the four months typically bringing greatest energy usage, June through September. The PSC described it as using "a multi-hour approach, which looks at a seven-hour time period, from 1:00 p.m. to 8:00 p.m., on the peak day of each summer month." In contrast, "12CP" stands for "twelve coincident peaks". The PSC described this as using "the peak hour from each month of the year."

ABATE states that the MH4CP method of calculating peak demand was in place when the Legislature prescribed the 50-25-25 formula and that the Legislature should thus be presumed to have intended that that component remain the operative one for that purpose. The PSC argues that the 12CP method had been used without incident in various earlier years and

that the absence of any such specification in MCL 460.11(1) left the peak-demand component to the PSC's discretion.

We agree with the PSC. "The court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used." *Ford Motor Co v Unemployment Compensation Comm*, 316 Mich 468, 473; 25 NW2d 586 (1947). Accordingly, the statute in question should be read with the understanding that the Legislature intended the specificity where it was specific and the silence where it was silent. See *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003) ("[W]e may not read into the statute what is not within the Legislature's intent as derived from the language of the statute."). That the Legislature specified the 50-25-25 weighting formula in connection with what was understood to be, respectively, peak demand, on-peak energy use, and total energy use while keeping silent about how any of those components would be determined, should thus be taken to indicate that the Legislature intended to prescribe the 50-25-25 formula while leaving the PSC and the utilities it regulates to determine such components as 12CP or MH4CP in the normal course of business. Accordingly, the statute's provision for modification of "this method" refers to the 50-25-25 formula, and the PSC need not rely on that language to justify its decision to change from the MH4CP to the 12CP methodology. For these reasons, we affirm the PSC's decision to use the 12CP component in this instance.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, J., concurred with SAAD, J.

SHAPIRO, P.J. (*concurring in part and dissenting in part*). I concur with the majority that the Public Service Commission's decision to allow rate decoupling should be reversed because the issue is plainly controlled by the Legislature's recent adoption of MCL 460.1089(6) and MCL 460.1097(4). These sections set forth the scope of the commission's authority specifically with respect to rate decoupling and clearly limit that authority, regardless of what its scope was before their passage. Thus, the statutes determine the outcome of this issue, and the extent of the commission's general authority as it existed before the adoption of these controlling provisions is not relevant to our decision.

I dissent from the majority's reversal of the PSC's approval of the advanced metering infrastructure program. Because this is an experimental program and because the commission's action was not arbitrary or capricious, we are bound to affirm. The majority states that it "declines to adopt" the arbitrary-and-capricious standard of review with respect to PSC authorization of experimental programs. However, that is in fact the standard. *Residential Ratepayer Consortium v Pub Serv Comm*, 239 Mich App 1, 5; 607 NW2d 391 (1999). The majority does not conclude, and I do not believe we can conclude, that the PSC's approval of the pilot program was arbitrary and capricious in light of the testimony of Detroit Edison's manager of systems operations and that of the manager of the Energy Efficiency Section of the Electric Reliability Division of the commission. As noted in *Residential Ratepayer*, experimental rates " 'by their very nature . . . must await results on a test basis' . . . ." *Id.* (citation omitted). I believe that the majority is putting the cart before the horse by requir-

ing that the commission conduct a full hearing on the results of the experimental program before the program has been conducted.

Moreover, it is not disputed that this issue was raised in an earlier case involving these parties, decided in the PSC's favor and not pursued by appellants to a decision by this Court.[1] While the doctrines of res judicata and collateral estoppel do not apply "in the pure sense" in ratemaking cases, "issues fully decided in earlier PSC proceedings need not be 'completely relitigated' in later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result is unreasonable." *In re Application of Consumers Energy Co For Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010), quoting *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 9; 420 NW2d 156 (1988). As appellants identify no new evidence or changed circumstances, I would defer to the earlier ruling.

I concur with the majority in all other respects.

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[1] See Public Service Commission Case No. U-15768, January 11, 2010, opinion and order, p 55, citing Public Service Commission Case No. U-15244, December 23, 2008, opinion and order, appeal dismissed by stipulation in *In re Application of Detroit Edison Co to Increase Rates*, unpublished order of the Court of Appeals, entered February 22, 2010 (Docket No. 291226).

PEOPLE v WATERSTONE

Docket Nos. 303268 and 303703. Submitted October 5, 2011, at Detroit. Decided April 10, 2012, at 9:05 a.m.

The Attorney General charged Mary M. Waterstone and three others in the 36th District Court with felonies for alleged misconduct arising out of a criminal prosecution in the Wayne Circuit Court in which Waterstone (hereafter defendant) sat as a circuit court judge. The district court, with regard to the counts that related to defendant exclusively (counts 12, 13, 14, and 15), which alleged that defendant violated MCL 750.505 when she willfully neglected her judicial duties by failing to disclose certain ex parte communications and perjured testimony, bound defendant over to the Wayne Circuit Court on all four counts. The circuit court, Timothy M. Kenny, J., granted defendant's motion to quash counts 12, 13, and 14 and denied defendant's motion to quash count 15. The Attorney General appealed by leave granted the part of the order quashing counts 12, 13, and 14 (Docket No. 303268) and defendant appealed by delayed application for leave to appeal granted the part of the order denying her motion to quash count 15 (Docket No. 303703). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

MCL 750.505 provides for criminal penalties and punishment when a person commits an offense that was indictable at the common law, such as misconduct in office, absent a statutory provision that expressly punishes the charged offense. MCL 750.478, a misdemeanor statute, is a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance), which is the type of misconduct set forth in the particular charges brought against defendant. The elements of the charged offense are the same elements of a statutory offense, MCL 750.478. Therefore, under the plain and unambiguous language in MCL 750.505, which was the sole statute relied on by the Attorney General in regard to counts 12, 13, 14, and 15, MCL 750.505 cannot be invoked as a basis to try and convict defendant. Defendant was entitled to dismissal of counts 12, 13, 14, and 15 without prejudice. The circuit court's ruling quashing counts 12,

13, and 14 is affirmed. The circuit court's ruling allowing count 15 to proceed to trial is reversed. The matter is remanded to the circuit court for the entry of an order fully dismissing the charges against defendant without prejudice.

1. At common law, misconduct in office was defined as corrupt behavior by an officer in the exercise of the duties of his or her office or while acting under color of his or her office. An officer could be convicted of misconduct in office (1) for committing any act that is itself wrongful (malfeasance), (2) for committing a lawful act in a wrongful manner (misfeasance), or (3) for failing to perform any act that the duties of the office require of the officer (nonfeasance).

2. An indictable common-law offense can be charged by the prosecution pursuant to MCL 750.505 unless punishment for that offense is otherwise expressly provided for by a statute. It is proper to dismiss a charge brought under MCL 750.505 if the charge sets forth all the elements of a statutory offense.

3. The crime of willful neglect of duty under MCL 750.478 is the same as the crime of misconduct in office under the common law in relation to a nonfeasance theory of prosecution. Defendant was charged with acts of nonfeasance, or failure to perform a legal duty. The Attorney General's case against defendant, prosecuted under MCL 750.505, actually sets forth all the elements of MCL 750.478, because defendant was charged with willfully neglecting her judicial duties.

4. MCL 750.478, which punishes the willful neglect of duty, necessarily encompasses the element of corrupt behavior. Corrupt behavior is also an element of misconduct in office committed through nonfeasance for purposes of MCL 750.505. There is no corrupt-behavior distinction between the two statutes. With respect to misconduct in office under a theory of nonfeasance, corrupt behavior or intent is the equivalent of willful neglect under MCL 750.478.

5. There is no relevant difference between corrupt behavior and willful neglect in the context of nonfeasance in relationship to a legal duty or obligation concerning nondiscretionary or ministerial acts.

6. MCL 750.478 addresses ministerial or nondiscretionary acts because it speaks of performing duties enjoined by law. The charges against defendant allege a failure to perform judicial duties that were nondiscretionary.

7. Willful neglect of duty and corrupt nonfeasance are effectively one and the same. If a public officer willfully neglected to perform a legal duty, the officer engaged in corruption or corrupt behavior.

8. The requisite intent for purposes of misconduct in office under MCL 750.505 is the intent to engage in corruption or corrupt behavior; a corrupt intent needs to be proven. Corrupt intent can be shown when there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of an office by an officer. The term "willful," with respect to MCL 750.478, encompasses a knowledge and purpose to commit a wrong (a bad purpose) while committing an intentional act of nonfeasance. Willful neglect of a duty required by law to be performed by an officer, i.e., deliberate forbearance, necessarily entails the intent to intentionally, knowingly, and purposely misbehave and engage in wrongful conduct. This intent is identical to the corrupt intent needed to establish misconduct in office under MCL 750.505. Therefore, there is no pertinent distinction between MCL 500.478 and MCL 500.505 in regard to the intent element.

9. Within the context of MCL 750.478, "neglect" means a failure to perform a legal duty, not negligence. A willful failure to perform does not encompass negligent conduct.

Affirmed in part, reversed in part, and remanded.

TALBOT, J., concurring in part and dissenting in part, stated that the majority's decision to remand with regard to counts 12, 13, and 14, which pertain to two ex parte communications and the failure to inform the underlying defendants of the perjured testimony, is not necessary because the charges cannot be sustained under either MCL 750.478 or MCL 750.505 unless defendant has breached or willfully neglected a recognized legal duty. No statutory basis exists to preclude any judge from engaging in ex parte communication; therefore, defendant's participation in ex parte communication cannot comprise the violation of a duty. The Code of Judicial Conduct sets forth parameters and guidelines for a judge's participation in ex parte communication as a standard to be applied, but the code does not impose a judicial duty. In the absence of a duty, participation in ex parte communication cannot comprise a public official's willful neglect to perform a legal duty. Because there was no legal duty, defendant's failure to disclose her participation cannot constitute a willful violation or constitute misconduct in office. The ex parte communication engaged in by defendant falls outside the behavior constrained by MCL 750.478 and MCL 750.505. Because defendant was already aware of the information contained in the ex parte communications, the underlying defendants were not prejudiced as a result of the ex parte communication. The Attorney General failed to identify any specific duty on the part of a judge to inform a defendant of perjured testimony. Absent the existence of a legal duty, any

allegation regarding breach of a duty or willful neglect of a duty cannot be sustained under either statute. Counts 12, 13, and 14 should be dismissed with prejudice. With regard to count 15, which charged defendant with misconduct in office for willfully neglecting her judicial duties by allowing perjured testimony to be heard by the jury, this count encompasses a clearly recognized legal duty, because the commission of perjury in court proceedings is prohibited by MCL 750.422 and the action required of a trial judge when perjury occurs is provided in MCL 750.426. A criminal conviction obtained through the knowing use of perjured testimony is violative of a defendant's due process rights under the Fourteenth Amendment. Because MCL 750.478 and MCL 750.505 both rely on the same duty for trial judges, the distinction between the felony of misconduct in office, MCL 750.505, and the misdemeanor of willful neglect of duty, MCL 750.478, rests on the existence of criminal intent. MCL 750.478 does not require a showing of criminal intent while MCL 750.505 does. MCL 750.478 does not constitute a separate codification of the offense of misconduct in office committed through nonfeasance and, therefore, does not preclude the instant charge in count 15 of misconduct in office based on nonfeasance under MCL 750.505. The trial court properly allowed count 15 to proceed to trial and correctly quashed counts 12, 13, and 14; however, such dismissal should have been with prejudice.

1. CRIMINAL LAW — PUBLIC OFFICERS — MISCONDUCT IN OFFICE — NONFEASANCE.

The statute regarding willful neglect of duty by a public officer expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance) (MCL 750.478).

2. PUBLIC OFFICERS — MISCONDUCT IN OFFICE — COMMON-LAW OFFENSES.

Misconduct in office was defined under the common law as corrupt behavior by an officer in the exercise of the duties of his or her office or while acting under color of his or her office; an officer could be convicted for committing any act that is itself wrongful (malfeasance), for committing a lawful act in a wrongful manner (misfeasance), or for failing to perform any act that the duties of the office require of the officer (nonfeasance).

3. PUBLIC OFFICERS — WILLFUL NEGLECT OF DUTY — MISCONDUCT IN OFFICE — NONFEASANCE.

The crime of willful neglect of duty under MCL 750.478 is the same as the crime of misconduct in office under the common law in relation to a nonfeasance theory of prosecution.

4. PUBLIC OFFICERS — WILLFUL NEGLECT OF DUTY — MISCONDUCT IN OFFICE — CORRUPT BEHAVIOR — NONFEASANCE.

MCL 750.478, which punishes a public officer's willful neglect to perform a legal duty, necessarily encompasses the element of corrupt behavior, which is also an element of the common-law offense of misconduct in office committed through nonfeasance for purposes of a prosecution under MCL 750.505; there is no corrupt-behavior distinction between the two statutes.

5. PUBLIC OFFICERS — CORRUPT BEHAVIOR — WILLFUL NEGLECT — NONFEASANCE — MINISTERIAL ACTS.

There is no relevant difference between corrupt behavior and willful neglect in the context of nonfeasance in relationship to a legal duty or obligation concerning nondiscretionary or ministerial acts of a public officer.

6. PUBLIC OFFICERS — WILLFUL NEGLECT OF DUTY — CORRUPT NONFEASANCE.

Willful neglect of duty and corrupt nonfeasance are effectively the same; if a public officer willfully neglects to perform a legal duty the officer has engaged in corruption or corrupt behavior.

7. PUBLIC OFFICERS — MISCONDUCT IN OFFICE — INTENT — CORRUPT INTENT.

The requisite intent for a charge of misconduct in office under the common law is the intent to engage in corruption or corrupt behavior; corrupt intent can be shown when there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of a public office by an officer (MCL 750.505).

8. PUBLIC OFFICERS — WILLFUL NEGLECT OF DUTY — INTENT.

The term "willful" in the statute regarding willful neglect of duty by a public officer encompasses a knowledge and purpose to commit a wrong while committing an intentional act of nonfeasance; a willful neglect of a duty required by law to be performed by an officer, i.e., deliberate forbearance, necessarily entails the intent to intentionally, knowingly, and purposely misbehave and engage in wrongful conduct; this intent is identical to the corrupt intent needed to establish misconduct in office under the common law (MCL 750.478; MCL 750.505).

9. PUBLIC OFFICERS — WILLFUL NEGLECT OF DUTY — WORDS AND PHRASES — NEGLECT.

The term "neglect," within the context of the statute regarding willful neglect of duty by a public officer, means a failure to

perform a legal duty, not negligence; a willful failure to perform does not encompass negligent conduct (MCL 750.478).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Anica Letica*, Assistant Attorney General, for the people.

Gerald K. Evelyn, *Juan A. Mateo*, and *Jay Y. Mandel* for defendant.

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

MURPHY, C.J. In these consolidated appeals, the Michigan Attorney General (AG) charged defendant with four counts of felony misconduct in office under MCL 750.505 arising out of a criminal prosecution in which defendant, sitting as a circuit court judge, is alleged to have willfully neglected her judicial duties by failing to disclose certain communications and perjured testimony. MCL 750.505 provides for criminal penalties and punishment when a person commits an offense that was indictable at the common law, such as misconduct in office, absent a statutory provision that expressly punishes the charged offense. We find that MCL 750.478, a misdemeanor statute, constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance), which is the type of misconduct set forth in the particular charges brought by the AG against defendant. The elements of the charged offense are the same elements of a statutory offense, MCL 750.478. Therefore, under the plain and unambiguous language in MCL 750.505, which is the sole statute relied on by the AG in regard to the four counts at issue, MCL 750.505 cannot be invoked as a basis to try and convict defendant. Defen-

dant is entitled to dismissal of the charges without prejudice. Accordingly, we affirm the circuit court's ruling quashing counts 12, 13, and 14 of the complaint, albeit for different reasons; however, we reverse the court's ruling allowing count 15 to proceed to trial.[1]

I. FACTUAL AND PROCEDURAL HISTORY

The underlying criminal case presided over by defendant concerned drug charges brought by the Wayne County Prosecutor's Office against Alexander Aceval and Ricardo Pena. The facts in that prosecution with respect to Aceval's alleged criminal activities, along with the facts regarding our defendant's behavior on the bench, were set forth as follows in *People v Aceval*, 282 Mich App 379, 382-385; 764 NW2d 285 (2009):

> This matter arises out of an illegal drug transaction. On March 11, 2005, police officers Robert McArthur, Scott Rechtzigel, and others, acting on information obtained from Chad William Povish, a confidential informant (CI), were on surveillance at J Dubs bar in Riverview, Michigan. Povish previously told police officers that [Aceval] had offered him $5,000 to transport narcotics from Detroit to Chicago. That day, the officers observed [Aceval], Povish, and Bryan Hill enter the bar. [Aceval] arrived in his own vehicle, while Povish and Hill arrived in another. Eventually the three individuals left the bar and loaded two black duffel bags into the trunk of Povish's car. Povish and Hill then drove away, while [Aceval] drove away in his own vehicle. Subsequently, the officers stopped both vehicles and found packages of cocaine in the duffel bags located in the trunk of Povish's car. [Aceval] was subsequently arrested and charged with possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and conspiracy to commit that offense, MCL 750.157a.

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[1] Counts 12 through 15 were the only counts that pertained to defendant.

Before trial, [Aceval] moved for the production of the identity of the CI. During an evidentiary hearing on June 17, 2005, [Aceval] requested that the trial court, Judge Mary Waterstone, conduct an in camera interview of McArthur, the officer in charge of the investigation. The judge agreed, and in the conference it was revealed that McArthur and Rechtzigel knew that Povish was the CI. Further, the officer told the trial court that Povish was paid $100 for his services, plus "he was going to get ten percent, whatever we got." The conference was sealed and the trial court denied [Aceval's] motion.

Subsequently, [Aceval] filed a motion to suppress certain evidence. During a hearing on September 6, 2005, Rechtzigel lied when he testified, in response to defense counsel's questioning, that he had never had any contact with Povish before March 11, 2005. The prosecutor did not object. On September 8, 2005, in another sealed in camera conference between the judge and the prosecutor, the prosecutor admitted that she knew that Rechtzigel had knowingly committed perjury but stated that she "let the perjury happen" because "I thought an objection would telegraph who the CI is." In response, the judge stated that she thought "it was appropriate for [the witness] to do that." Further, the court added, "I think the CI is in grave danger . . . . I'm very concerned about his identity being found out."

The matter went to trial on September 12, 2005. At trial, the prosecutor and the judge continued their efforts to protect the CI's identity. Povish testified that he had never met Rechtzigel or McArthur before they stopped his vehicle on the day that he received the duffel bags and that neither had offered him a deal of any kind. He further testified that he did not know what was in the duffel bags and that, until trial, he believed that he could be charged with a crime for his role in the incident. The prosecutor made no objection to this testimony. The prosecutor and the judge again indicated, in another sealed ex parte bench conference on September 19, 2005, that they knew Povish had perjured himself in order to conceal his identity. At the

close of the trial, the jury was unable to reach a verdict and, thus, the trial court declared a mistrial.

On December 7, 2005, attorney Warren E. Harris filed an appearance to represent [Aceval] in his retrial, again in Judge Waterstone's court. On March 6, 2006, attorney David L. Moffitt petitioned for leave to file a limited appearance solely for purposes of filing certain motions by [Aceval], which the trial court granted on March 17, 2006. Subsequently, at a hearing on March 28, 2006, [Aceval] indicated that he had become aware that the CI was Povish and argued that the case should be dismissed because of the trial court's and the prosecutor's complicit misconduct in permitting perjured testimony. [Aceval] also requested that both the prosecuting attorney and Judge Waterstone disqualify themselves from the case. Judge Waterstone disqualified herself on the record. The following day, Judge Vera Massey-Jones, the successor judge, entered an order unsealing the three in camera interviews.

* * *

[Aceval's] retrial began on June 1, 2006, with Harris acting as counsel. Before trial, [Aceval] allegedly contacted a prosecution witness and directed him to provide false testimony in support of the defense. After the prosecution discovered this information, it informed the trial court and defense counsel. Subsequently, the witness testified that [Aceval] had asked him to lie and he purged [sic] his testimony. Thereafter, [Aceval] pleaded guilty to the charge of possession with intent to distribute more than 1,000 grams of cocaine.

This Court affirmed Aceval's plea-based conviction. *Id.* at 392-393.[2]

Subsequently, after a series of issues and problems

[2] Aceval was tried jointly, before separate juries, with codefendant Pena. Pena's involvement in the narcotics transactions is unclear from the record and the discussion in *Aceval*; however, he eventually pleaded guilty of conspiracy to deliver more than 1,000 grams of a controlled substance.

were resolved related to the proper prosecuting entity for purposes of the case at bar, see *People v Waterstone*, 287 Mich App 368; 789 NW2d 669 (2010), rev'd and remanded to 36th District Court 486 Mich 942 (2010), the AG pursued charges against defendant. The AG had also brought charges against the prosecutor and the two police officers involved in the concealment and perjury alluded to in *Aceval*. The charges brought against defendant were contained in counts 12 through 15 of the AG's complaint, which provided:

> COUNT 12 DEFENDANT(S) (04): COMMON LAW OFFENSES
>
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 8, 2005 and concealing that communication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. . . .
>
> COUNT 13 DEFENDANT(S) (04): COMMON LAW OFFENSES
>
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 19, 2005 and concealing that communication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. . . .
>
> COUNT 14 DEFENDANT(S) (04): COMMON LAW OFFENSES
>
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by concealing perjured testimony from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena by her rulings and orders; contrary to MCL 750.505. . . .

COUNT 15 DEFENDANT(S) (04): COMMON LAW OFFENSES

> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by allowing perjured testimony [to] be heard by the jury in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. . . .

The district court bound defendant over on all four counts of misconduct in office, but the circuit court quashed counts 12 through 14, while allowing the AG to go to trial solely on count 15. In Docket No. 303268, the AG appeals by leave granted the circuit court's order quashing the first three counts. In Docket No. 303703, defendant appeals by delayed application for leave to appeal granted the circuit court's order permitting the AG to pursue the final count. It is unnecessary for us to review the reasoning behind the rulings of the district and the circuit court, given that we are resolving these consolidated appeals on an issue raised sua sponte by us at oral argument, which was not addressed nor argued below. We ordered the parties to submit supplemental briefs to address, in part, whether MCL 750.478 precludes the AG's prosecution of defendant under MCL 750.505. Briefs were submitted, and we now proceed to rule.

II. ANALYSIS

A. STANDARDS OF REVIEW

"This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an information." *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004). A trial court abuses its discretion when its decision falls outside the range of

reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). A trial court necessarily abuses its discretion when it makes an error of law. *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006). This Court reviews de novo questions of statutory construction. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010).

B. PRINCIPLES OF STATUTORY INTERPRETATION

In *Flick*, the Michigan Supreme Court recited the well-established principles that govern our interpretation of a statute:

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. [*Id*. at 10-11 (citations and some quotation marks omitted).]

With respect to statutory interpretation of provisions contained within the Penal Code, MCL 750.2 provides:

> The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

C. DISCUSSION

Counts 12 through 15 have one important feature in common; they all charge defendant with "willfully

neglecting her judicial duties." The AG brought the charges pursuant to MCL 750.505, which provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

"The offense of misconduct in office was an indictable offense at common law." *People v Coutu (On Remand)*, 235 Mich App 695, 705; 599 NW2d 556 (1999). In *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003), our Supreme Court observed:

> At common law, misconduct in office was defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999) . . . , quoting Perkins & Boyce, Criminal Law (3d ed), p 543. An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance. Perkins, p 540.

The AG has been adamant throughout the proceedings that *all four charges* are predicated on nonfeasance and nonfeasance alone, and the counts themselves are drafted in terms of willful neglect of duty.[3] One of the

[3] At first glance, counts 12 and 13 appear to concern acts of misfeasance or malfeasance, where they address ex parte communications permitted or considered by defendant, but the language regarding these communications is directly tied to the concealment of the communications, given that defendant failed to share the communicated information–nonfeasance–with Aceval and Pena. It is the concealment aspect of defendant's actions that drives counts 12 and 13. Had defendant engaged in the ex parte communications and then informed Aceval and Pena about the

questions posed in this appeal, and the only one that need be addressed given our view on the issue, is whether MCL 750.478 precludes a prosecution by the AG against defendant under MCL 750.505. An indictable common-law offense can be charged by the prosecution pursuant to MCL 750.505 unless punishment for that offense is otherwise expressly provided for by statute. It is proper to dismiss a charge brought under MCL 750.505 if the charge " 'sets forth all the elements of [a] statutory offense' . . . ." *People v Thomas*, 438 Mich 448, 453; 475 NW2d 288 (1991) (citation omitted).

In *Thomas*, the defendant was charged, in part, with the common-law felony of obstruction of justice under MCL 750.505 for having prepared a false police incident report. The Court addressed the argument whether the offense should have been dismissed in light of MCL 752.11, which makes it a misdemeanor for a public official to willfully and knowingly fail to uphold or enforce the law with the result that a person's legal rights are denied. *Thomas*, 438 Mich at 453. The Court found that MCL 752.11 concerned omissions of duty, i.e., nonfeasance, and failed to include affirmative acts and commissions, i.e., misfeasance or malfeasance; therefore, because the conduct at issue, falsifying a police report, was an act of commission, it exceeded the strictures of MCL 752.11. *Thomas*, 438 Mich at 454-455. Accordingly, the prosecutor was not prohibited from charging the defendant with common-law obstruction of justice under MCL 750.505. *Id.* at 455.[4]

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communications, there would have been no basis for a criminal prosecution. Thus, the overall nature of counts 12 and 13 relates to nonfeasance, which is exactly what the AG claims.

[4] We also note the language in *Coutu*, 235 Mich App at 705, wherein the Court stated that the prosecution properly charged the defendants under MCL 750.505 for misconduct in office, "assuming of course that the conduct charged . . . was not more properly charged pursuant to another

MCL 750.478, the statute at issue here, addresses the willful neglect of duty by a public officer and provides as follows:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, *every willful neglect to perform such duty*, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00. [Emphasis added.]

In *People v Bommarito*, 33 Mich App 385; 190 NW2d 359 (1971), the defendant, a former county undersheriff, was charged with four counts of violating MCL 750.478 relative to various failures to enforce the law—nonfeasance. This Court held that "[f]ailure to enforce the law or prevent a violation of which he is cognizant constitutes a breach of this duty," and "[s]uch a breach of duty is a wilful neglect of duty in violation of [MCL 750.478]." *Id.* at 388-389. In *People v Medlyn*, 215 Mich App 338; 544 NW2d 759 (1996), this Court also addressed a prosecution under MCL 750.478, wherein the defendant, a deputy sheriff, was convicted of willful neglect of duty for his failure to report a physical and sexual assault against a prisoner in the county jail after the prisoner had informed the defendant of the assault; the prisoner had been repeatedly beaten and raped on a daily basis after informing the defendant before the prisoner was transferred to a new ward. The focus of

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statute . . . ." In *People v Davis*, 408 Mich 255, 275; 290 NW2d 366 (1980) (opinion by COLEMAN, C.J.), the Court observed, "[S]ince the Legislature has expressly made a provision for the punishment of an officer who receives a promise or any valuable thing as consideration for delaying an arrest [MCL 750.123], this conduct is not punishable under MCL 750.505 . . . because it is not an offense 'for the punishment of which no provision is expressly made by any statute of this state'."

the appeal regarded the meaning of "willful" neglect, which we shall address in detail hereinafter, with this Court initially noting that there was no dispute that the defendant "had a duty to report any allegations made by inmates to him . . . ." *Id.* at 341. The Court affirmed the defendant's conviction under MCL 750.478. *Id.* at 346.

Bommarito and *Medlyn* make it abundantly clear, and it is readily evident from the plain and unambiguous language of the statute, that MCL 750.478 is a statutory provision that makes it a violation of law for a public officer to willfully neglect to perform a legal duty; it squarely concerns omissions of duty. Stated otherwise, MCL 750.478 criminally punishes a public officer for "failing to perform any act that the duties of the office require of the officer, nonfeasance." *Perkins*, 468 Mich at 456. It thus appears that the crime of willful neglect of duty under MCL 750.478 is the same as the crime of misconduct in office under the common law in relationship to a nonfeasance theory of prosecution. Unlike the situation in *Thomas*, 438 Mich 448, where the defendant was charged with committing acts of misfeasance or malfeasance and a statute concerning nonfeasance was examined, defendant here was charged with acts of nonfeasance, or failure to perform a legal duty, and MCL 750.478 encompasses the failure to perform a legal duty, nonfeasance. The AG's case against defendant, prosecuted under MCL 750.505, actually sets forth all the elements of MCL 750.478 because the AG charged defendant with "willfully neglecting her judicial duties."

We next address the elements of corrupt behavior or intent and willful neglect in relationship to MCL 750.505 and MCL 750.478. We find that the misdemeanor statute, MCL 750.478, which punishes the

willful neglect of duty, necessarily encompasses the element of corrupt behavior and that corrupt behavior is also an element of misconduct in office committed through nonfeasance for purposes of MCL 750.505. There is no corrupt-behavior distinction between the two statutes. Even were we to assume that corrupt behavior is an element relative to MCL 750.505 and not MCL 750.478, the misdemeanor statute would control because of the manner in which the AG framed the counts and pursued the prosecution, which was focused simply on willful neglect of judicial duties. In other words, the charges, as presented, fall directly within the parameters of MCL 750.478. More importantly, however, we find that, with respect to misconduct in office under a theory of nonfeasance, corrupt behavior or intent is the equivalent of willful neglect under MCL 750.478.

In discussing misconduct in office as prosecuted under MCL 750.505, this Court in *People v Milton*, 257 Mich App 467, 472; 668 NW2d 387 (2003), noted that the "defendant's misconduct was intentional, i.e., resulted from a corrupt intent . . . ." In *Coutu*, 235 Mich App at 706, after indicating that the word "corruption" means a " 'sense of depravity, perversion or taint,' " and following a dictionary exploration of each of those terms, this Court concluded, pursuant to the definitions, that "a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer."[5] The Court noted that it is deemed "corrupt" for a public officer to purposely commit a violation of any duties associated with the officer's job

[5] Misconduct in office "does not encompass erroneous acts done by officers in good faith or honest mistakes committed by an officer in the discharge of his duties." *Id*.

or office. *Id.* at 706-707; see also *People v Hardrick*, 258 Mich App 238, 247; 671 NW2d 548 (2003). The *Hardrick* panel found that the "defendant acted with a corrupt purpose when he made deliberate and knowing use of [an] advance copy of [a] test to assist him in taking the sergeant's examination and thereby improperly obtain[ed] a promotion." *Id.*

The cases in the preceding paragraph equated corrupt behavior with intentional, purposeful, deliberate, and knowing wrongful behavior.

In *Medlyn*, 215 Mich App at 345, this Court construed MCL 750.478, and more particularly the words "willful neglect," finding that "[t]he trial court properly instructed the jury that a 'bad purpose' was essential for criminal liability and that the 'bad purpose' element could be met upon a mere showing that defendant failed to do what he was obligated to do." When utilized in a criminal context, the term "willfully" has been variously defined in the caselaw as meaning and embodying evil intent, guilty knowledge, or a bad purpose, and it indicates a purpose and knowledge to do wrong. *People v Greene*, 255 Mich App 426, 442; 661 NW2d 616 (2003); *People v Lockett (On Rehearing)*, 253 Mich App 651, 654; 659 NW2d 681 (2002); *Medlyn*, 215 Mich App at 344-345; *People v Culp*, 108 Mich App 452, 456; 310 NW2d 421 (1981); *People v Lerma*, 66 Mich App 566, 570; 239 NW2d 424 (1976). Of course, "willful" also describes conduct that is intentional, purposeful, voluntary, deliberate, and knowing. *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994).

On consideration of the authorities cited above, we see no relevant difference between corrupt behavior and willful neglect in the context of nonfeasance in relationship to a legal duty or obligation concerning nondiscretionary or ministerial acts. We find further

support for this proposition in the following passages from Perkins & Boyce, Criminal Law (3d ed), p 541-542, 546-547, which is a treatise that was cited in *Perkins*, 468 Mich at 456, and *Coutu*, 235 Mich App at 705-706:

> [T]here should be no conviction of [misconduct in office] . . . if the absence of any element of corruption has been clearly established, unless the prosecution is under a statute substantially different from the common law in this respect. . . .
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> * * *
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> It is possible, of course, for legislation to go beyond the common law and to include within the area of punishability certain acts which were not previously criminal. If the statute provides that an intentional violation of its provisions constitutes guilt, no more is required, but this is not truly an enlargement of the offense because it is *corrupt* for an officer purposely to violate the duties of his office. . . .
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> * * *
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> . . . Any intentional and deliberate refusal by an officer to do what is unconditionally required of him by the obligations of his office is *corrupt* as the word is used in this connection because he is not permitted to set up his own judgment in opposition to the positive requirement of the law. Since this is corrupt misbehavior by an officer in the exercise of the duties of his office there is no reason to require more for conviction. On the other hand, when the officer has discretion in regard to a certain matter, his intentional and deliberate refusal to act indicates no more, on its face, than that this represents his judgment as to what will best serve the public interest. Even in such a case the officer will be guilty of misconduct in office if his forbearance results from corruption rather than from the exercise of official discretion, but it will always be necessary to show something more than the intentional and deliberate forbearance to do a discretionary act.

MCL 750.478 addresses ministerial or nondiscretionary acts, because it speaks of performing duties "enjoined by law." And the charges brought against defendant alleged a failure to perform judicial duties that were nondiscretionary. It is not the AG's position that defendant had discretion in deciding whether to conceal or disclose information. Indeed, the AG states in his supplemental brief that "[f]or non-discretionary acts, as here, the refusal to perform a required duty is corruption per se . . . ."

In *Perkins*, 468 Mich at 456, quoting *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999), the Court first indicated that misconduct in office, in general, encompassed " 'corrupt behavior,' " but it then proceeded to make the following statement, which has been the bane of the parties' analysis:

> [C]ommitting nonfeasance or acts of malfeasance or misfeasance are not enough to constitute misconduct in office. In the case of malfeasance and misfeasance, the offender also must act with a corrupt intent, i.e., with a "sense of depravity, perversion or taint." In the case of nonfeasance, an offender must willfully neglect to perform the duties of his office. Perkins [& Boyce], p 547. [*Id.* (citations omitted).]

In our view, reading the Supreme Court's words in context, the Court was not intending to indicate that corrupt behavior played no role in regard to nonfeasance, especially given its initial proclamation that misconduct in office "was defined as 'corrupt behavior by an officer'." *Perkins*, 468 Mich at 456, quoting *Coutu*, 459 Mich at 354. Rather, the Court was implicitly equating willful neglect with corrupt behavior. This becomes crystal clear when one looks at the discussion in Perkins & Boyce, p 547, which was the specific citation given by the Supreme Court in

support of its statement that nonfeasance entails a willful neglect to perform the duties of office. *Perkins*, 468 Mich at 456. On pages 547-548 of Perkins & Boyce, the authors state:

> Confusion at this point has led to the occasional suggestion that the mental element required for the crime of misconduct in office is "wilfulness" if the act is one of omission and "corruption" if it is an act of commission [misfeasance or malfeasance]. "Wilfulness," as so used, is intended to mean deliberate forbearance, and to repeat a previous suggestion: what should be said is that the wilful refusal of an officer to perform a ministerial act required by law constitutes *corruption*. [Emphasis added.]

This proposition is entirely consistent with our discussion of the Michigan authorities set forth earlier, and it results in an interpretation of *Perkins*, 468 Mich 448, that is consistent with the mass of cases that include a corruption element with respect to all aspects of misconduct in office, including misconduct by nonfeasance. There is no need to engage in a dicta analysis. Willful neglect of duty and corrupt nonfeasance are effectively one and the same for our purposes. If a public officer willfully neglects to perform a legal duty, he or she engaged in corruption or corrupt behavior.

The dissent argues that the felony statute relative to misconduct in office includes the element of criminal intent, while the misdemeanor statute does not require the prosecution to establish criminal intent. The requisite "intent" for purposes of misconduct in office under MCL 750.505 is the intent to engage in corruption or corrupt behavior; a corrupt intent needs to be proven. *Perkins*, 468 Mich at 456; *Hardrick*, 258 Mich App at 244, 246-247; *Milton*, 257 Mich App at 471-472; *People v Carlin (On Remand)*, 239 Mich App 49, 64; 607 NW2d 733 (1999); *Coutu*, 235 Mich App at 706 (misconduct in office requires "a showing of corrupt intent"). As indi-

cated earlier, corrupt intent "can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer." *Id.* " 'It is *corrupt* for an officer purposely to violate the duties of his office.' " *Id.* at 706-707 (citation omitted). And, with respect to the misdemeanor statute, MCL 750.478, the term "willful" encompasses a knowledge and purpose to commit a wrong ("bad purpose"), *Lockett*, 253 Mich App at 654-655; *Medlyn*, 215 Mich App at 344-345, while committing an intentional act of nonfeasance. Willful neglect of a duty required by law to be performed by an officer, i.e., deliberate forbearance, necessarily entails the intent to intentionally, knowingly, and purposely misbehave and engage in wrongful conduct. This intent is identical to the corrupt intent needed to establish misconduct in office under MCL 750.505; therefore, there is no pertinent distinction between the statutes in regard to the "intent" element.

The dissent complains that our analysis results in an unjustifiable felony-misdemeanor distinction between malfeasance and nonfeasance for behavior that may be equally egregious. First, such an argument bears on a matter of policy with respect to punishment and is thus within the exclusive domain of the Legislature. Second, our Supreme Court in *Thomas*, 438 Mich 448, was more than prepared to make a similar distinction had the alleged conduct actually constituted nonfeasance as governed by the relevant misdemeanor statute.

The AG posits that the validity of a charge brought under MCL 750.505 for misconduct in office predicated on nonfeasance is well established by all the cases and to rule otherwise would conflict with precedent. The gaping hole in this argument is that none of the cases confronted the issue regarding the interplay between

MCL 750.478 and MCL 750.505; the matter has never been addressed in the caselaw.[6]

The AG also argues that mere negligence is sufficient to prove willful neglect under MCL 750.478, thereby distinguishing that misdemeanor nonfeasance offense from a felony nonfeasance offense under MCL 750.505, which requires greater culpability by insisting on proof of corrupt behavior or an intentional failure to perform. The clear language of MCL 750.478 precludes any interpretation suggesting that negligence would suffice. As read in context in MCL 750.478, "neglect" means a failure to perform a legal duty, not negligence. A willful failure to perform does not encompass negligent conduct. One cannot negligently, willfully fail to perform.

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[6] We note that while MCL 750.478 governs *as between* it and MCL 750.505 under the charges presented here, there may be an argument that MCL 752.11, which was addressed in *Thomas*, 438 Mich 448, controls over MCL 750.478. As indicated above, MCL 750.478 addresses willful neglect in the performance of a duty, "where no special provision shall have been made for the punishment of such delinquency . . . ." Clearly, MCL 750.505 is not a "special provision," but rather a broad common-law catchall provision. MCL 752.11, however, provides:

> Any public official, appointed or elected, who is responsible for enforcing or upholding any law of this state and who wilfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor.

There is no need to reach the issue whether any potential misdemeanor prosecution, in whole or in part based on the framing of the charges, would need to be pursued under MCL 752.11 instead of MCL 750.478. Furthermore, assuming that MCL 752.11 is the controlling statute, the same analysis and reasoning that support our finding that MCL 750.478 governs over MCL 750.505 might perhaps support a finding that MCL 752.11 controls over MCL 750.505. See *Thomas*, 438 Mich 448. Not having surveyed the entire Penal Code in all its vastness, it is conceivable that the AG's charges fit within a yet more narrowly tailored statute. That said, the bottom line is that the instant prosecution, as currently charged, cannot be maintained under MCL 750.505.

Finally, and as somewhat alluded to in footnote 6 of this opinion, we find it extremely important to emphasize that while we conclude that the AG's case against defendant cannot be maintained under MCL 750.505 as currently charged, we are not substantively ruling that there are no legal problems or potential obstacles to the AG pursuing misdemeanor charges under MCL 750.478, should the AG decide to renew charges against defendant. For example, whether the ex parte communications can be the basis for a criminal conviction under MCL 750.478 is not expressly before us, because charges under that statute have not been brought. Similarly, whether a violation of the Code of Judicial Conduct can form the basis for criminal charges is not presently before the Court. But see *Clayton v Willis*, 489 So 2d 813, 815 (Fla App, 1986); *People v La Carrubba*, 46 NY2d 658, 663-664; 416 NYS2d 203; 389 NE2d 799 (1979).

III. CONCLUSION

We hold that MCL 750.478 constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance), which is the type of misconduct set forth in the particular charges brought by the AG against defendant. The elements of the charged offense are the elements of a statutory offense, MCL 750.478. Therefore, under the plain and unambiguous language in MCL 750.505, which is the statute relied on by the AG in regard to the four counts at issue, MCL 750.505 cannot be invoked as a basis to try and convict defendant. Defendant is entitled to dismissal of the charges without prejudice. Accordingly, we affirm the circuit court's ruling quashing counts 12, 13, and 14 of the complaint, albeit for

different reasons; however, we reverse the court's ruling allowing count 15 to proceed to trial.

Affirmed in part, reversed in part, and remanded for entry of an order fully dismissing the charges against defendant without prejudice. We do not retain jurisdiction.

MURRAY, J., concurred with MURPHY, C.J.

TALBOT, J. (*concurring in part and dissenting in part*). I write separately because I believe it unnecessary to remand certain issues to the trial court because of the absence of a legal duty to support the charges and my concern for the potential impact of the issues involved in this appeal on the integrity of the judiciary.

I. FACTUAL HISTORY/BACKGROUND

While it is unnecessary to repeat the entire history surrounding these consolidated appeals, it is worthwhile to emphasize that it is undisputed that the two police officers, Robert McArthur and Scott Rechtzigel, and the confidential informant (CI), Chad Povish, committed perjury during both a pretrial proceeding and at trial. It is also undisputed that defendant was aware of the perjury and engaged in two ex parte hearings with the assistant prosecuting attorney, Karen Plants.

As noted, the Michigan Attorney General (AG) brought four charges of misconduct in office, comprised of the following:

> COUNT 12 DEFENDANT(S) (04): COMMON LAW OFFENSES
>
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 8, 2005 and concealing that commu-

nication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or $10,000.00

COUNT 13 DEFENDANT(S) (04): COMMON LAW OFFENSES

did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 19, 2005 and concealing that communication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or $10,000.00

COUNT 14 DEFENDANT(S) (04): COMMON LAW OFFENSES

did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by concealing perjured testimony from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena by her rulings and orders; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or $10,000.00

COUNT 15 DEFENDANT(S) (04): COMMON LAW OFFENSES

did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by allowing perjured testimony [to] be heard by the jury in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or $10,000.00

Specifically, the charges arose from the events described as follows:

Counsel for Aceval requested that defendant conduct an in camera interview with McArthur to verify the existence of a confidential informant. On June 17, 2005, defendant conducted the interview in which McArthur and Rechtzigel named Povish as the confidential informant and disclosed the details of the deal provided by the police to Povish for his involvement. As a result of this interview, defendant determined that it was not necessary to reveal Povish's identity as the confidential informant because of concerns regarding his safety. During a September 6, 2005, hearing on Aceval's motion to suppress evidence, Rechtzigel committed perjury by denying any previous contact with Povish. The prosecutor, Plants, did not object to the testimony despite being aware that it was false.

Plants requested an ex parte meeting with defendant on September 8, 2005; that meeting comprises the basis for count 12. Plants requested the meeting because of indications by Aceval's counsel that he was seeking, despite defendant's earlier ruling, to procure cellular telephone records of Povish and another witness in order to ascertain the identity of the confidential informant. Allegedly, Plants initiated the meeting to request that defendant sign an ex parte order that would preclude Aceval's counsel from obtaining the records. During this meeting, Plants also confirmed that Rechtzigel committed perjury when he did not truthfully respond to questions that would have revealed his meeting with Povish at an earlier date and Povish's status as the confidential informant. Defendant agreed that there existed a significant risk to the safety of Povish if his identity as the confidential informant was revealed.[1] A sealed transcript of the

[1] The transcript of this meeting is approximately 3½ pages in length. With regard to the acknowledgement of perjury by Rechtzigel, Plants said:

meeting was prepared at defendant's behest.

On September 12, 2005, Povish lied while under oath at trial in response to questions that would reveal his status as the confidential informant. Again, Plants failed to object to the testimony. On September 19, 2005, while the trial was in progress, the second ex parte communication occurred between Plants and defendant, comprising count 13. During this meeting, Plants confirmed that additional incidents of perjury had occurred during the trial by Povish and McArthur, purportedly to protect the identity of the confidential informant.[2] Ultimately, the jury was charged and Pena was convicted, but Aceval was granted a mistrial be-

> We were doing an evidentiary hearing on Tuesday concerning Mr. Pena and, with Mr. [James] Feinberg's [Aceval's attorney] prompting, Mr. [Steven] Scharg [Pena's attorney] asked the witness, Sergeant Rechtzigel, whether he had met Chad Povish, Brian Hill or the defendant prior to March 11th, 2005. Sergeant Rechtzigel said no. This clearly contradicts earlier testimony he gave about the CI which he had met. He knowingly committed perjury to protect the identification of the CI. To answer yes would have indicated that he had met them in a confidential informant capacity. I did not object at that point because I thought an objection would telegraph who the CI is. I let the perjury happen. He committed perjury knowingly, all in efforts to comply with the Court's order to keep the CI confidential.

[2] The transcript of this meeting is slightly over one page in length. Plants indicated:

> With regard to Chad Povish's testimony, he was asked whether he had been offered any sort of deals or immunity. He said no. He obviously was offered a deal because he's the confidential informant. . . . His testimony was 'no' but he did that to conceal his identity. He indicated that he had never seen Mac [McArthur] before that day. Obviously that was to conceal his identity and there was something else. Oh, he doesn't remember what was said to him by Mac. When he was interviewed at the police department there was [sic] discussions about what a good job he had done and so that was not exactly the truth. But again it was done with the intent to conceal his identity. When Officer McArthur testified, he testified that he had no information where the cocaine was going. He was in constant communication with the confidential informant and so

cause of the inability of his jury to reach a decision. Defendant's concealment of the perjured testimony from Aceval and Pena and permitting such testimony to be heard by the jury serve as the underlying factual basis for count 14 and count 15, respectively.

II. PROCEDURAL HISTORY

I believe it both relevant and useful to review the trial court's decision and reasoning to place into perspective the events that have transpired and the issues raised before this Court.

While the district court bound defendant over on all four counts of misconduct in office, the circuit court quashed counts 12, 13, and 14. Pertaining to these charges, the circuit court ruled, in relevant part:

> In this particular case labeling this particular action and conduct by Judge Waterstone as neglect is a label and is a conclusion drawn, but it is a label and a conclusion drawn by the Attorney General's office.
>
> But in this Court's view this was not neglect of any kind. This was a wilful, intentional, deliberate attempt that quite frankly this Court finds was an ex-parte communication that was not illegal.
>
> A review of the evidence in this particular case indicates that on September 8th and September 19th that ex-parte communications were made with the Court because there was an immediate concern, identifiable concern regarding whether or not a witness on behalf of the prosecution was going to be identified and killed.
>
> To me the notion of the expectation that the Court would invite the defense to participate in that conversation I think is not correct, and I do think that as has been

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he knew what directions they were going in. Clearly he testified that way to keep the identity secret.

identified here, this is not negligence. This was an intentional, deliberate conduct on the part of Judge Waterstone.

I don't think that there is any other interpretation that can be placed on it. She made a separate record so that her action, her decisions could in fact be reviewed by a later court, and it was done for the specific protection of the life of an informant.

Now to me this is very much analogous to a circumstance where if in fact the police or the investigator or the prosecutor had identifiable, tangible information that during the course of the trial that the defense was attempting to bribe a juror or threatening a juror, one would not expect that that would be an identification made to the Court with the other side knowing about that.

I find that the same is applicable with regard to Count 14, that the conduct of Judge Waterstone was not out of a neglect of her duty, but an intentional conduct which, if anything, would put it into the category of misfeasance rather than any type of nonfeasance.

Misfeasance, as it would apply to Counts 12, 13 and 14 requires a corrupt purpose. There is no evidence to indicate there is any corrupt purpose.

So with regards to Counts 12, 13 and 14, the Motion to Quash is granted with regard to those three counts.

The circuit court allowed the prosecution to proceed against defendant only on count 15, stating, in significant part:

With regards to Count 15, Judge Waterstone is charged with committing misconduct in office by neglecting her judicial duties by allowing perjured testimony to be heard by the jury and not correcting that perjury that came before that jury.

Now one of the issues that has been of some real concern for this Court is to determine exactly how the alleged misconduct is to be categorized.

Now the Attorney General has categorized it as in all four counts as neglecting judicial duties.

That labeling does not necessarily make it so, but there is an allegation, and it is the prosecutor's theory that in Count 15 as with regards to the other counts against Judge Waterstone that it was nonfeasance on the part of the trial judge in the Aceval and Pena case.

The prosecutor cites dicta in the [*People v*] *Perkins* [468 Mich 448; 662 NW2d 727 (2003)] case as to what constitutes nonfeasance and what the elements are.

But the Court in its research has found interestingly enough that with any number of cases where one reads what is a definition or the distinction between misfeasance and nonfeasance, you can get a different definition, different verbiage used for that particular concept.

The Court did find additionally helpful the case of [*Gray v Clerk of Common Pleas Court*, 366 Mich 588; 115 NW2d 411 (1962)].

* * *

And the Supreme Court in the [*Gray*] case harkens back to a case of [*In re Cartwright*, 363 Mich 143; 108 NW2d 865 (1961)], where misfeasance is defined, which it's stated, ["]as a cause for removal from office, is a default in not doing a lawful thing in a proper manner, or omitting to do it as it should be done." [See *Gray*, 366 Mich at 593.]

The Court in [*Gray*] went on to define nonfeasance, and I quote: "nonfeasance is a substantial failure to perform a duty, or, in other words the neglect or refusal, without sufficient excuse, to do that which it was the officer's legal duty to do. Failure to perform the duties of a public office is in and of itself not only nonfeasance but also malfeasance.["] [See *Gray*, 366 Mich at 594.]

Now in this particular case the prosecution has alleged, and the Preliminary Examination established, that there was perjured testimony that was presented during the jury trial, and the trial court did not correct that particular perjury. Did in fact allow that to go forward.

It went forward, and one of the defendants, Mr. Pena, was in fact convicted.

> Now this Court finds that that does in fact constitute what would be considered the failure to perform the duties of a public office; that being performing the responsibility of the Court.
>
> This Court does in fact find that with regards to Count 15 that there was no abuse of discretion for the Examining Magistrate to conclude that there was a failure to perform those duties and that it was in effect not error.

Both the AG and defendant appeal the circuit court's decision.

III. STANDARDS OF REVIEW

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it."[3] The prosecution need not establish guilt beyond a reasonable doubt, but must present "evidence sufficient to make a person of ordinary caution and prudence [] conscientiously entertain a reasonable belief of the defendant's guilt."[4] "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of the defendant if such evidence establishes probable cause."[5] If probable cause exists to believe that a felony was committed and that the defendant committed it, the district court must bind the defendant over for trial.[6]

"This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an

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[3] *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003).

[4] *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006).

[5] *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003) (citation and quotation marks omitted).

[6] MCL 766.13; MCR 6.110(E); *Hill*, 269 Mich App at 514.

information."[7] An abuse of discretion occurs when the outcome falls outside "the range of reasonable and principled outcomes."[8] This Court reviews de novo a trial court's interpretation of the law related to its decision on a motion to quash the information.[9]

IV. ANALYSIS

On appeal, the AG and defendant take issue with various aspects of the trial court's rulings and its decision to quash three of the four counts of misconduct in office and in permitting the fourth count to proceed to trial. In essence, the appeals by the AG and defendant distill down to challenges regarding what behavior is encompassed by misconduct in office and the use of the felony statute[10] in charging that offense.

This Court further complicated the appeal when, at oral argument, we requested the parties to address additional points not raised in their appellate pleadings. We posed three questions to counsel for supplemental briefing:

> (1) What distinguishes acts of willful neglect of duty under MCL 750.478 from acts of nonfeasance comprising misconduct in office under MCL 750.505?
>
> (2) Does MCL 750.478 codify misconduct in office premised on nonfeasance and preclude the bringing of charges for misconduct in office based on nonfeasance under MCL 750.505? If charges are wrongfully brought pursuant to MCL 750.505, what is the proper remedy?
>
> (3) Can acts comprising willful neglect of duty encompass erroneous acts performed in good faith?

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[7] *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004).

[8] *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

[9] *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010).

[10] MCL 750.505.

Specifically, we sought to determine whether the prosecution properly charged defendant under the *felony* statute governing misconduct in office even though the wording of the various counts was identical to the language in the referenced *misdemeanor* statute.

The felony statute provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.[11]

It is undisputed that "misconduct in office was an indictable offense at common law"[12] and, thus, is included within the statute.[13] Misconduct in office is defined under common law as " 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' "[14] "An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance."[15]

In comparison, the misdemeanor statute states:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the

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[11] MCL 750.505.

[12] *People v Coutu (On Remand)*, 235 Mich App 695, 705; 599 NW2d 556 (1999).

[13] MCL 750.505.

[14] *Coutu*, 235 Mich App at 705, quoting Perkins & Boyce, Criminal Law (3d ed), p 543.

[15] *Perkins*, 468 Mich at 456.

> punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.[16]

Our Supreme Court has indicated that "when a 'charge sets forth all the elements of the statutory offense,' a conviction under MCL 750.505 . . . cannot be sustained."[17] The statutory provision[18] "does not preclude prosecution for the common-law offense whenever the *conduct* at issue is covered by another statute; it precludes use of the common-law offense when that *offense* has been codified by the legislature."[19] Specifically, when evaluating whether an offense is chargeable under the misconduct in office statute or precluded by another criminal statute, this Court has stated that "the misconduct in office charge is the 'indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state.' *There is no statute that expressly provides punishment for misconduct in office* . . . ."[20]

The majority has concluded that the misdemeanor statute[21] "constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance)" as charged by the prosecution. As a result, the majority dismisses without prejudice all the counts against defendant because the felony

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[16] MCL 750.478.

[17] *People v Thomas*, 438 Mich 448, 453; 475 NW2d 288 (1991), quoting *People v Davis*, 408 Mich 255, 274; 290 NW2d 366 (1980).

[18] MCL 750.505.

[19] Gillespie, Michigan Criminal Law & Procedure (2d ed), Practice Deskbook (2011 ed), § 5:672, citing *People v Milton*, 257 Mich App 467; 668 NW2d 387 (2003).

[20] *Milton*, 257 Mich App at 472, quoting MCL 750.505 (emphasis added).

[21] MCL 750.478.

charges premised on misconduct in office are precluded by the existence and applicability of the misdemeanor statute.

The dismissal of all the charges without prejudice prolongs this matter without definitive resolution, a result I believe to be in error and unnecessary. The majority's decision to remand with regard to counts 12, 13, and 14 pertaining to the two ex parte communications and the failure to inform Aceval and Pena of the perjured testimony is not necessary, because it is irrelevant whether these charges are pursued under the felony statute or the misdemeanor statute. Rather, the threshold issue, which is properly before this Court, is whether a legal duty exists that defendant violated. In other words, charges cannot be sustained under either the felony statute or the misdemeanor statute unless defendant has breached or willfully neglected a recognized legal duty.

For purposes of clarity and simplification, I find it most productive to review and analyze the counts individually.

COUNT 12

In count 12, the AG charged defendant with "misconduct in office" premised on defendant "willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 8, 2005 and concealing that communication from the defendants . . . ." The ex parte communication referenced for this count occurred during pretrial proceedings.

In my opinion, the charges associated with this count were properly quashed because no statutory basis exists to preclude defendant—or any judge—from engaging in an ex parte communication. Consequently, defendant's

participation in an ex parte communication cannot comprise the violation of a duty.

In asserting defendant's participation in ex parte communications comprised a violation of duty, the AG relies on and cites provisions within the Code of Judicial Conduct. The Code of Judicial Conduct provides, in relevant part:

> The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:
>
> * * *
>
> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:
>
> (a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:
>
> (i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.
>
> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
>
> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

> (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
>
> (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.[22]

As indicated by the Code of Judicial Conduct, engaging in an ex parte communication is not specifically prohibited. In fact, "an *ex parte* conference to discuss threats against a witness is proper" but requires a court to "insure that the conference is carefully conducted so that no rights of the defendant are threatened."[23] In a similar case in which a prosecutor initiated ex parte communications with a trial court because of concerns regarding the safety of a witness, it was held:

> The . . . court did not abuse its discretion in making the initial decisions to allow the *ex parte* proceedings. In each instance, the court was presented with a plausible argument by the government that providing [the defendant] with the information requested would endanger its witnesses and deter them from testifying. . . . The court clearly benefited from having this information, but providing it simultaneously to [the defendant] would have risked revealing the identities of the witnesses that the government sought to protect. As previously noted, courts have recognized circumstances such as these as justifying an *ex parte* proceeding . . . .[24]

Under the circumstances of this case, I do not construe defendant's "initial decision[] to allow the *ex parte* proceedings" to constitute an abuse of discretion. Further, a judge's decision to participate in the ex parte communication is not subject to criminalization under

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[22] Code of Judicial Conduct, Canon 3(A)(4).

[23] *United States v Adams*, 785 F2d 917, 920 (CA 11, 1986).

[24] *United States v Napue*, 834 F2d 1311, 1320-1321 (CA 7, 1987).

either statutory provision, even if error is deemed to have occurred in the subsequent handling of the information generated from the meeting.

The Code of Judicial Conduct sets forth parameters and guidelines for a judge's participation in an ex parte communication as a "standard" to be applied, but does not impose a judicial duty. In other words, the code distinguishes between the elements comprising a duty and the standard applied in evaluating the performance of a duty. Pursuant to the language of the code, involvement in an ex parte proceeding does not fall within the definition of misconduct in office, which is "corrupt behavior by an officer *in the exercise of the duties of his office* or while acting under color of his office."[25] Therefore, in the absence of a duty, participation in an ex parte proceeding cannot comprise a public officer's "willful neglect to perform [any] duty" as contemplated by the misdemeanor statute.[26]

The participation of a judge in an ex parte communication is not within the "duties of his office" and cannot, by definition, constitute a "willful neglect to perform" a legal duty. Rather, the strictures pertaining to participation in an ex parte communication are merely guidelines for performance. Any error or failure by defendant (or any judge) to follow the specified standards does not rise to the level necessary to comprise a violation of either the felony statute or the misdemeanor statute. Violation of these standards is,

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[25] *Coutu*, 235 Mich App at 705 (emphasis added, citation and quotation marks omitted).

[26] MCL 750.478. As an aside, I would suggest that, when viewed in the context of the language of the misdemeanor statute, defendant's participation in an ex parte proceeding cannot, by definition, be construed as comprising nonfeasance. Participation requires overt action and not a failure to act or the willful neglect of a specific duty, which the trial court recognized to be more properly characterized as misfeasance.

rather, within the purview of the Judicial Tenure Commission (JTC). Specifically, "[t]he Commission's authority is limited to investigating alleged judicial misconduct and, if warranted, recommending the imposition of discipline by the Michigan Supreme Court. Judicial misconduct usually involves conduct in conflict *with the standards* set forth in the Code of Judicial Conduct."[27] Defendant's participation in an ex parte communication was not violative of a duty of her office. Hence, because there was no legal duty, the failure to disclose her participation cannot constitute a willful violation or be construed as comprising misconduct in office.

Specific to count 12 is the fact that the ex parte communication occurred during pretrial proceedings with defendant serving as the fact-finder. Defendant had already made a determination that revealing the identity of the confidential informant was unnecessary. Any information gleaned by defendant from this ex parte proceeding was merely a confirmation of what defendant already knew regarding the identity of the CI and his relationship and/or interactions with the police. The information provided by Plants did not provide defendant with any new extrinsic information or affect her previous ruling regarding the CI's identity. Because defendant was already aware of the information obtained from the prosecutor during this first ex parte communication, Aceval and Pena could demonstrate no prejudice from this communication. Thus, this ex parte communication falls outside the behavior constrained by either statutory provision.

By charging defendant for participating in this ex parte communication, the AG seeks to criminalize what is essentially a discretionary act that is not specifically

[27] <http://jtc.courts.mi.gov> (emphasis added).

prohibited by statute or the Code of Judicial Conduct. Further, the possible precedent established by charging defendant for participation in an ex parte proceeding raises serious concerns for all sitting judges. Of particular concern is the potential for the arbitrary and subjective determination by a prosecutor of which ex parte communications comprise indictable offenses. The possibility of the absurd results that could occur is effectively demonstrated in this case wherein defendant is charged with a criminal offense for participating in an ex parte communication that conveyed no new or revelatory information. The majority, by remanding these issues to the trial court, has engaged in an implicit validation of such a procedure and effectively avoided addressing the more pertinent and underlying question whether a duty even exists.

As it pertains to count 12, I would rule that the charge against defendant, under either the felony statute or the misdemeanor statute, for engaging in an ex parte proceeding and the failure to disclose that proceeding to Aceval and Pena, was properly quashed on the basis that defendant's participation in the meeting did not violate a judicial duty.

COUNT 13

Similar to count 12, count 13 involves a charge of misconduct in office for defendant's participation in an ex parte communication with the prosecutor on September 19, 2005, during the course of trial. Specifically, the AG charged defendant with "willfully neglecting her judicial duties by permitting or considering an improper ex parte communication . . . and concealing that communication from the defendants . . . ." While distinguishable from count 12 as having occurred during the course of trial rather than pretrial proceedings,

the legal analysis of the sustainability of the charge is not at variance with that I have outlined for count 12.

Defendant's participation in the ex parte communication did not constitute the violation of a legal "duty." Ex parte communications are not subject to blanket exclusion by the Code of Judicial Conduct and are permissible under certain circumstances and pursuant to specific standards. Whether defendant violated those standards by participating in the ex parte communication is a matter more properly within the purview of the JTC rather than subject to enforcement through criminal statutes. Therefore, for the same reasons discussed in conjunction with count 12, I would find that the trial court properly quashed count 13.

COUNT 14

In count 14, the AG charged defendant with misconduct in office "by willfully neglecting her judicial duties by concealing perjured testimony from the defendants . . . ." The AG is specifically referring to the failure of defendant to inform counsel for Aceval and Pena that perjured testimony occurred during the course of trial. The AG asserts that this failure to inform the defendants constituted misconduct in office through nonfeasance. The AG has not, however, identified any specific duty on the part of a judge to inform a defendant of perjured testimony, which is a necessary prerequisite to sustaining this count under either the felony or the misdemeanor statute. Again, if the AG cannot demonstrate the existence of a duty, any allegation regarding breach or willful neglect cannot be sustained.

Michigan statutory law sets forth the procedure for judges to follow where perjury has occurred, and provides:

> Whenever it shall appear to any court of record that any witness or party who has been legally sworn and examined or has made an affidavit in any proceeding in a court of justice, has testified in such a manner as to induce a reasonable presumption that he has been guilty of perjury therein, the court may immediately commit such witness or party, by an order or process for that purpose, or may take a recognizance with sureties, for his appearing to answer to an indictment for perjury; and thereupon the witness to establish such perjury may, if present, be bound over to the proper court, and notice of the proceedings shall forthwith be given to the prosecuting attorney.[28]

Although the statute indicates that the court may immediately indict a suspected perjurer, the statute does not expressly mandate that the court must inform a defendant of the perjury. Ironically, particularly given the circumstances existing in this matter, the judge is to inform the prosecution of the perjury. Having cited only general precepts pertaining to defendant's obligations in accordance with the Code of Judicial Conduct,[29] the AG has failed to sufficiently demonstrate the willful neglect of an official duty by defendant or to meet the requirements necessary to sustain a charge of misconduct in office.

In summary, because I would find that there was no cognizable legal duty breached or violated by defendant as required under either statute for these three counts, I would dismiss these counts with prejudice because it constitutes an unnecessary exercise and waste of judicial resources to remand to the trial court for further proceedings on counts 12, 13, and 14.

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[28] MCL 750.426.

[29] Canon 2(A) requires judges to avoid "all impropriety and appearance of impropriety." Canon 2(B) mandates judges to "respect and observe the law."

COUNT 15

Because this final charge concerns a trial judge knowingly allowing perjured testimony to be considered by a jury, it is the most troubling count on a variety of levels. In count 15, the AG charged defendant with misconduct in office for "willfully neglecting her judicial duties by allowing perjured testimony [to] be heard by the jury . . . ." Unlike the previous three counts, this charge encompasses a clearly recognized legal duty, because the commission of perjury in court proceedings has long been prohibited.[30] A specific statutory provision addresses the action required of a judge when perjury occurs.[31] In addition, it has long been acknowledged that a criminal conviction obtained through the knowing use of perjured testimony is violative of a defendant's due process rights under the Fourteenth Amendment.[32]

In this Court, defendant argued that the trial court erred by failing to quash count 15 because the felony statutory provision[33] underlying the charge has never been used to indict a judge acting in his or her official capacity.[34] Defendant did not raise the language of the misdemeanor statute. At oral argument, this Court sought clarification from the parties, in seeking to

[30] MCL 750.422.

[31] MCL 750.426.

[32] *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).

[33] MCL 750.505.

[34] Defendant further contended that she should be immune from prosecution for misconduct in office and that her good intention of protecting the CI is dispositive regarding whether the misconduct in office charge can be sustained. Defendant also asserted that the AG's initiation of charges violates the separation of powers because the JTC is responsible for handling all instances pertaining to judicial misconduct.

determine whether the AG properly charged defendant under the felony[35] statute rather than the misdemeanor statute.[36]

As noted previously, the felony statute used to charge defendant provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.[37]

Therefore, the felony statute requires that the offense be indictable at common law and that another statute does not punish that behavior.

Misconduct in office comprised a recognized indictable offense at common law and is defined as " 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' "[38] An officer can be convicted of misconduct through acts of misfeasance, malfeasance, or nonfeasance.[39] In turn, discussing corrupt behavior in the context of misconduct in office, this Court has stated:

> "Corruption" in this context means a "sense of depravity, perversion or taint." [Perkins & Boyce] at 542. "Depravity" is defined as "the state of being depraved" and "depraved" is defined as "morally corrupt or perverted." *Random House Webster's College Dictionary* (1997). "Perversion" is "the act of perverting," and the term "perverted" includes in its definition "misguided; distorted;

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[35] MCL 750.505.

[36] MCL 750.478.

[37] MCL 750.505.

[38] *Coutu*, 235 Mich App at 705, quoting Perkins & Boyce, Criminal Law (3d ed), p 543.

[39] *Perkins*, 468 Mich at 456.

> misinterpreted" and "turned from what is considered right or true." *Id.* The definition of "taint" includes "a trace of something bad or offensive." *Id.* Pursuant to the definitions, a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer. See also Perkins & Boyce, supra at 542 ("It is *corrupt* for an officer purposely to violate the duties of his office.").[40]

In contrast, the statutory language comprising the misdemeanor statute states:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.[41]

The majority has concluded that the misdemeanor statute encompasses the charged behavior and ends its analysis there. As discussed further hereinafter, the two statutes have distinct elements regarding criminal intent. Thus, the misdemeanor statute does not already punish the charged behavior and the felony charge under MCL 750.505 is not precluded. Whether the AG would elect to continue that charge in light of the following analysis remains questionable.

Discerning the elements distinct to each statutory provision is especially important because the AG charged defendant with "willfully neglecting her judicial duties" and adamantly characterized defendant's actions solely as constituting nonfeasance. It must be assumed as an underlying premise that all trial judges,

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[40] *Coutu*, 235 Mich App at 706-707.

[41] MCL 750.478.

including defendant, are entrusted with the duty to conduct a fair trial and preclude a conviction or judgment that they know involves perjured testimony. This is based, at least in part, on the statutory duty imposed on trial judges to instruct a jury in accordance with the following:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require.[42]

Because both statutes rely on the same duty for trial judges, the distinction between the felony of misconduct in office and the misdemeanor of willful neglect of duty rests on the existence of criminal intent. Discerning this distinction is complicated by the historic confusion of terms, the imprecise use of language, and the misconstruing of terms as being interchangeable. As illustrated, "corrupt behavior" has been equated with criminal intent; however, it is a separate concept both by definition and in statutory application.

The misdemeanor statute requires "willful neglect," but fails to define the term. When a term is not defined within a statute, we assign to the term its plain and ordinary meaning within the context it is used.[43] To ascertain the meaning of a term we may consult dictionary definitions.[44] The term "willful neglect" is defined

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[42] MCL 768.29.

[43] MCL 8.3a.

[44] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

as the "[i]ntentional or reckless failure to carry out a legal duty . . . ."[45] Similarly, this Court has defined the word "willful" as comprising actions that are " 'voluntarily, consciously, and intentionally' undertaken . . . ."[46] When actions are undertaken " 'voluntarily, consciously, and intentionally,' " they "may be sufficient to constitute 'wilfulness,' even though the actions may have been taken from a 'pure' or 'good faith' motive."[47] In other words, any element of "bad purpose" attributable to willful neglect "could be met upon a mere showing that defendant failed to do what he was obligated to do."[48]

In contrast, the felony statute encompasses "misconduct in office," which has historically been defined as " 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' "[49] "An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance."[50] Malfeasance, misfeasance, and nonfeasance are merely the different means or mechanisms to effectuate the corrupt behavior.

Further, misconduct in office "does not encompass erroneous acts done by officers in good faith or honest mistakes committed by an officer in the discharge of his

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[45] Black's Law Dictionary (9th ed), p 1133.

[46] *People v Medlyn*, 215 Mich App 338, 342; 544 NW2d 759 (1996), quoting *People v Harrell*, 54 Mich App 554, 561; 221 NW2d 411 (1974).

[47] *Id*.

[48] *Medlyn*, 215 Mich App at 345.

[49] *Coutu*, 235 Mich App at 705, quoting Perkins & Boyce, Criminal Law (3d ed), p 543.

[50] *Perkins*, 468 Mich at 456.

duties."[51] This is diametrically opposed to the definition of actions that are undertaken "willfully," as such actions "may have been taken from a 'pure' or 'good faith' motive."[52] Other criminal statutes, that define the term "wilful," highlight this distinction:

> "Wilful", for the purpose of criminal prosecutions, means the intent to do an act knowingly and purposely by an individual who, having a free will and choice, either intentionally disregards a requirement of this act [the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*.], or a rule or standard promulgated pursuant to this act, or is knowingly and purposely indifferent to a requirement of this act, or a rule or standard promulgated pursuant to this act. An omission or failure to act is wilful if it is done knowingly and purposely. Wilful does not require a showing of moral turpitude, evil purpose, or criminal intent provided the individual is shown to have acted or to have failed to act knowingly and purposely.[53]

In the context of misconduct in office, "nonfeasance" is not simply an omission or a failure to act, but rather is defined as an affirmative act encompassing "willful neglect" or "deliberate forbearance."[54] Although the conduct sought to be constrained by either statute encompasses the willful neglect of duty, the felony offense of misconduct in office contains an additional element or requirement. Although willful neglect can serve to establish corrupt behavior, the common-law offense of misconduct in office has, historically, also necessitated the demonstration of criminal intent. Specifically, this Court has indicated, " 'misconduct in office is corrupt misbehavior by an officer in the exer-

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[51] *Coutu*, 235 Mich App at 706.

[52] *Medlyn*, 215 Mich App at 342.

[53] MCL 408.1006(8). See, also, *People v Lanzo Constr Co*, 272 Mich App 470, 475; 726 NW2d 746 (2006).

[54] Perkins & Boyce, Criminal Law (3d ed), pp 547-548.

cise of the duties of his office or while acting under color of his office, *and criminal intent is an essential element of the crime*.' "[55] In contrast, this Court has opined, in analyzing the misdemeanor statute,[56] that the term "willfully" "requires something less than specific intent, but requires a knowing exercise of choice."[57] I glean from the above that the felony statute requires criminal intent, while the misdemeanor statute does not.

Historical developments of the common law further support the existence of such a distinction. As discussed by the United States Supreme Court:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." Common-law commentators of the Nineteenth Century early pronounced the same principle . . . .
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> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took

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[55] *Coutu*, 235 Mich App at 706, quoting 67 CJS, Officers, § 256, pp 789-790 (emphasis added).

[56] MCL 750.478.

[57] *People v Lockett (On Rehearing)*, 253 Mich App 651, 655; 659 NW2d 681 (2002).

> deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.[58]

The requirement of criminal intent, as the distinguishing feature between the felony statute and the misdemeanor statute, is logical based on the definition of misconduct in office. To interpret these statutes otherwise would inexplicably reduce the penalty for misconduct in office solely on the basis of the commission of the offense through nonfeasance rather than malfeasance or misfeasance. This would then lead to absurd and inconsistent rulings for behavior deemed equally egregious.

Such a distinction is consistent with the legal concept and definition of "criminal intent" as "[a]n intent to commit an actus reus without any justification, excuse,

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[58] *Morissette v United States*, 342 US 246, 250-252; 72 S Ct 240; 96 L Ed 288 (1952).

or other defense."[59] In using the term "criminal intent," it has been suggested that "other term[s] such as mens rea or guilty mind should be employed for more general purposes, and 'criminal intent' be restricted to those situations in which there is (1) an intent to do the *actus reus*, and (2) no circumstance of exculpation."[60] This is distinguished from the concept of "general intent," which is defined as "[t]he intent to perform an act even though the actor does not desire the consequences that result."[61] This coincides with the differentiations recognized in Michigan, that "the distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act."[62] In accordance with prior decisions by this Court:

> "A much more workable definition would center upon the several mental states set forth in the various proposed criminal codes. Analyzed in this fashion, specific intent crimes would be limited only to those crimes which are required to be committed either 'purposefully' or 'knowingly,' while general intent crimes would encompass those crimes which can be committed either 'recklessly' or 'negligently.' Thus, in order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur, whereas in a general intent crime, the prohibited result need only be reasonably expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result."[63]

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[59] Black's Law Dictionary (9th ed), p 881.

[60] *Id*., quoting Perkins & Boyce, Criminal Law (3d ed), pp 832-834.

[61] Black's Law Dictionary (9th ed), p 882.

[62] *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983).

[63] *People v Gould*, 225 Mich App 79, 85; 570 NW2d 140 (1997), quoting *People v Lerma*, 66 Mich App 566, 569-570; 239 NW2d 424 (1976).

Hence, the ability of the prosecutor to prove intent in electing to charge defendant under either the felony statute or the misdemeanor statute becomes relevant, which was conceded by the AG during oral argument in this Court.

The AG must submit proofs on defendant's intent, but not necessarily on her motive. As previously discussed by our Supreme Court:

> Although sometimes confused, motive and intent are not synonymous terms. A motive is an inducement for doing some act; it gives birth to a purpose. The resolve to commit an act constitutes the intent. The motive inducing the resolve, while illuminative of the intent, is necessarily merged therein and is not an essential element in proving commission of crime. The essential element of intent is not at all dependent upon motive. If the intent appears the motive inducing the design may be shown but if not shown the design remains and, as the intent governs, the inducement creating the intent is not essential. A motive is a relevant but not an essential fact in proof of murder. It is true it exists whether disclosed or not. If disclosed it may aid the prosecution, but if not disclosed, or only faintly discernible, its absence or hidden character does not abort the charge if the intent is established. The evidence of motive was meager but what there was of it went to the jury, and properly so, on the question of intent.[64]

Defendant's intent comprises an element of the crime of misconduct in office, which presents an issue for resolution by the trier of fact.[65] To prove misconduct in office, the AG must demonstrate, as threshold requirements, the existence of corrupt behavior and an intent to procure the result obtained, in this instance the convictions of Aceval and Pena. Therefore, if the AG elects to proceed with the charge of misconduct in

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[64] *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925).

[65] *People v Whittaker*, 187 Mich App 122, 128; 466 NW2d 364 (1991).

office, evidence of defendant's intent comprises a relevant matter to be submitted to the jury for determination to establish the threshold necessary to sustain the charge. This is entirely consistent with prior rulings of this Court that determined, " 'misconduct in office is corrupt misbehavior by an officer in the exercise of the duties of his office . . . and criminal intent is an essential element of the crime.' "[66]

I find that the misdemeanor statute and the felony statute comprise separate and distinct codifications. The willful neglect of duty encompassed by the misdemeanor statute does not include the additional element of criminal intent or specific intent that must be demonstrated to sustain a charge of misconduct in office committed through nonfeasance. In other words, the misdemeanor statute does not constitute a separate codification of the offense of misconduct in office committed through nonfeasance and, therefore, does not preclude the instant charge in count 15 of misconduct in office based on nonfeasance.[67]

I would, therefore, find that the trial court properly allowed count 15 to proceed and correctly quashed counts 12, 13, and 14.

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[66] *Coutu*, 235 Mich App at 706, quoting 67 CJS, Officers, § 256, pp 789-790.

[67] *Milton*, 257 Mich App at 472.

PEOPLE v KHANANI

Docket No. 301138. Submitted January 5, 2012, at Detroit. Decided March 1, 2012. Approved for publication April 10, 2012, at 9:10 a.m.

Imran Khanani pleaded guilty in the Wayne Circuit Court in two separate cases of identity theft, MCL 445.65, stealing or retaining a financial transaction device without consent, MCL 750.157n(1), breaking and entering a vehicle causing damage, MCL 750.356a(3), larceny from a motor vehicle, MCL 750.356a(1), and stealing or retaining a financial transaction device without consent, MCL 750.157n(1). Following the plea hearing for those charges, the court, Cynthia Gray Hathaway, J., informed Khanani that she intended to sentence him under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*. Khanani thereafter pleaded guilty, in a third case, of first-degree home invasion, MCL 750.110a(2), for a crime he committed while on bond before sentencing on the earlier plea-based convictions. At the subsequent sentencing hearing for all the plea-based convictions, the trial court assigned Khanani to youthful-trainee status under HYTA and sentenced him on each offense to one year in jail without early release and three years' probation. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

1. Under HYTA, defendants charged with committing certain crimes while between the ages of 17 and 21 may be excused from having a criminal record. Assignment to youthful-trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status. HYTA is evidence of a legislative intent that persons in that age group not be stigmatized with criminal records for immature acts made without reflection. A trial court has wide discretion in placing a youthful offender under HYTA, but when making the decision should consider the seriousness of the offense, the defendant's age, and whether the defendant was on bond for another offense when the crime was committed.

2. Khanani was 19 years old when he invaded the home of a friend's family 3 weeks after his plea-based convictions for less serious crimes for which he was offered possible youthful-trainee

status and 17 days after a lengthy discussion with the probation agent about the significance of the youthful-trainee program for his future. In addition, the trial court noted that it was frightened by Khanani, that time would determine whether he was a serious predator as described by the prosecutor, and that it would grant him youthful-trainee status as an acknowledgement of his family's efforts in raising him. The trial court abused its discretion by assigning Khanani to youthful-trainee status on all charges in light of the relevant circumstances, including his age, the seriousness of the home-invasion offense, and the fact that defendant was on bond when he committed that offense, all of which revealed that his five earlier felonies were not simply uncharacteristic acts of immaturity.

3. Because the trial court abused its discretion by assigning Khanani to youthful-trainee status, it was unnecessary to address whether the sentencing guidelines apply to conditions imposed by a court under MCL 762.13 of HYTA.

Reversed and remanded for resentencing.

STEPHENS, J., dissenting, agreed with the majority's summary of the applicable law, but would have remanded the cases to the trial court for further articulation of the reasons for assigning Khanani to youthful-trainee status. It was unclear what factors ultimately motivated the court's decision to sentence Khanani under HYTA.

SENTENCES — HOLMES YOUTHFUL TRAINEE ACT — ASSIGNMENT — ABUSE OF DISCRETION.

Under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., defendants charged with committing certain crimes while between the ages of 17 and 21 may be assigned to youthful-trainee status, which does not constitute a conviction of a crime unless the court revokes the defendant's status; HYTA is evidence of a legislative intent that persons in that age group not be stigmatized with criminal records for immature acts made without reflection; a trial court has wide discretion in placing a youthful offender under HYTA, but when making its decision should consider the defendant's age, the seriousness of the offense, and whether the defendant was on bond for another offense when the crime was committed.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Train-

ing, and Appeals, and *Marilyn A. Eisenbraun*, Assistant Prosecuting Attorney, for the people.

Michael J. McCarthy, P.C. (by *Michael J. McCarthy*), for defendant.

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. The prosecution appeals by delayed leave granted[1] the sentences imposed following defendant's guilty pleas in three cases. First, in LC No. 09-030086-FJ, defendant pleaded guilty of identity theft, MCL 445.65, and stealing or retaining a financial transaction device without consent, MCL 750.157n(1). Second, in LC No. 10-001149-FH, defendant pleaded guilty of breaking and entering a vehicle causing damage, MCL 750.356a(3), larceny from a motor vehicle, MCL 750.356a(1), and stealing or retaining a financial transaction device without consent, MCL 750.157n(1). Third, in LC No. 10-003752-FH, defendant pleaded guilty of first-degree home invasion, MCL 750.110a(2). For each offense the trial court sentenced defendant to one year in jail without early release and three years' probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*. In all three cases, we reverse and remand for resentencing. Further, defendant shall have an opportunity to withdraw his guilty pleas on any conditional pleas predicated on HYTA status being granted.

The prosecution argues that the trial court abused its discretion by granting youthful-trainee status to defendant. We agree. "This Court reviews for an abuse of

[1] *People v Khanani*, unpublished order of the Court of Appeals, entered February 11, 2011 (Docket No. 301138).

discretion a trial court's decision concerning a defendant's assignment under the [HYTA]." *People v Giovannini*, 271 Mich App 409, 411; 722 NW2d 237 (2006). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"The [HYTA] offers a mechanism by which youths charged with committing certain crimes between their seventeenth and twenty-first birthdays may be excused from having a criminal record." *People v Bobek*, 217 Mich App 524, 528-529; 553 NW2d 18 (1996). The HYTA provides in relevant part:

> Except as provided in subsections (2) and (3),[2] if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee. [MCL 762.11(1).]

"An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *People v Dipiazza*, 286 Mich App 137, 141; 778 NW2d 264 (2009). The HYTA "evidences a legislative desire that persons in this age group not be stigmatized with criminal records for unreflective and immature acts." *People v Perkins*, 107 Mich App 440, 444; 309 NW2d 634 (1981). A defendant is "not ineligible for sentencing under the [HYTA] solely because he was convicted of two criminal offenses." *Giovannini*, 271 Mich App at 410.

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[2] These subsections, MCL 762.11(2) and (3), do not apply in this case.

"A trial court has wide discretion in placing a youthful offender under the [HYTA], subject to review by the appellate courts." *Giovannini*, 271 Mich App at 416. In exercising its discretion, a trial court should consider the seriousness of the offense as a factor on an equal footing with the defendant's age. *People v Fitchett*, 96 Mich App 251, 253; 292 NW2d 191 (1980). In *Fitchett*, the defendant was 17 years old, "near to the lower age limit within which the act applies." *Id*. Nonetheless, this Court determined that there was no abuse of discretion in the denial of youthful-trainee status in light of the nature and severity of the charged offenses, i.e., "breaking and entering an occupied dwelling with the intent to commit larceny, punishable by a maximum of 15 years incarceration, and arson of a dwelling house, which carries a 20-year maximum sentence . . . ." *Id*. at 254; see also *People v Teske*, 147 Mich App 105, 106-109; 383 NW2d 139 (1985) (concluding that there was no abuse of discretion in the denial of youthful-trainee status to a 17-year-old defendant who committed armed robbery given the seriousness of the offense).

In this case, the trial court's decision to grant youthful-trainee status fell outside the range of reasonable and principled outcomes in light of the relevant circumstances, including defendant's age, the seriousness of the home-invasion offense and the timing of its commission a mere three weeks after being placed on bond pending sentencing for the earlier offenses and even being instructed at that time by the trial court and his probation officer of the benefits of HYTA treatment and that he could be referred for HYTA consideration. Specifically, at the plea hearing in the first two cases, the trial court expressed its intent to refer defendant, who turned 19 years old the day after the hearing, for HYTA consideration. Three weeks later, while on bond awaiting sentencing, defendant invaded Veena Jindal's

home. Defendant later acknowledged that Jindal's son had befriended him, providing him with a ride to school every day and helping him with his homework. The Jindals twice had defendant to their home for dinner. Apparently using his knowledge of the Jindal home, defendant and an accomplice entered the home without permission in the middle of the night with the intent to commit larceny, terrifying Jindal's 20-year-old daughter, who hid in a closet for 15 minutes as defendant and his accomplice ransacked the home. Months later, the Jindal family continued to experience fear living in their home.

The defense contends that defendant was a follower rather than a leader. However, it was defendant who knew the Jindal family and who had been a guest in their home, and it was thus defendant who was able to exploit his knowledge of that home to invade it. It therefore appears unlikely that the Jindals would have been targeted but for defendant's relationship with the family. Further, defendant committed the home invasion while on bond, a mere 21 days *after* he was offered possible youthful-trainee status for less serious crimes and a mere 17 days *after* a lengthy discussion with the probation officer regarding the significance of the youthful-trainee program for his future. These facts establish far more than an uncharacteristic lack of maturity or reflection by a young offender. Rather, they show a calculated effort by defendant both to exploit a family that had befriended him and to escalate his criminal activity in defiance of the potential lenient treatment offered to him for his other crimes. Defendant's commission of the more serious home-invasion offense while on bond also reveals that his five earlier felonies were not simply uncharacteristic acts of immaturity. In

these circumstances, a reasonable and principled basis on which to grant youthful-trainee status did not exist.

In addition, the trial court's own statements at sentencing reflected that defendant was not an appropriate candidate for youthful-trainee status. The court stated that it was "frighten[ed]" by defendant's actions. After the prosecutor described defendant as "a very serious predator," the trial court noted that the prosecutor's description of defendant was "not totally inaccurate" and that the prosecutor had

> hit the nail on the head. It's scary because there's something going on inside of you that not only has allowed you to do these things here, but maybe if you get another chance, and you will get another chance. I don't know if it'll be today, I don't know if it'll be a year from now, two or three years from now, you may do something even worse because you've got that kind of a profile.

The trial court further told defendant that "you frighten me. Quite frankly, you frighten me. I'm going to give you somewhat of a break." After stating that it would grant HYTA status for three cases for the first time in any sentencing the court had conducted, the court told defendant that "we'll see if [the prosecutor] has accurately described you today, which I think she has. But we'll see for sure, okay?" Finally, after defendant thanked the court for its sentence, the court stated: "Well, I did it for your family. . . . I think that they deserve some acknowledgement of the effort that they've put into trying to raise you to be a productive and constructive citizen. So, I did it for them. Now you take it from here, okay."

Given the trial court's description of defendant as "frighten[ing]" and its apparent agreement with the prosecutor's description of defendant as a serious

predator, it was not reasonable to grant youthful-trainee status and then state that "we'll see" if the prosecutor's description was correct. Such a decision reflects a failure to appropriately take into account the nature and severity of the crimes and the importance of public safety. Further, the trial court's statement that defendant's parents deserved acknowledgement for their efforts to raise defendant to be a productive citizen was not a principled basis on which to grant youthful-trainee status. The court's decision must be based on an evaluation of the relevant circumstances, including the defendant's age and the seriousness of the offense. Youthful-trainee status should not be used as a mere vehicle to communicate the court's acknowledgement of the parents' efforts.[3]

Finally, the prosecution recognizes that the sentencing guidelines have not been held to apply to conditions imposed under the HYTA, but contends that the guidelines articulate legislatively determined categories of appropriate sentencing considerations.[4] The prosecution contends that the trial court's scoring of the guidelines in the absence of sentencing under the HYTA would have placed defendant at prior record variable

[3] As our dissenting colleague points out, various parts of the trial court's "freewheeling colloquy" with defendant might be construed as implying additional conclusions about defendant and his sentence that could possibly support the "extraordinary sentence" imposed. We are, however, simply not comfortable basing our decision on what the trial court might have implied in light of its explicit and definitive statements on the record.

[4] The prosecution notes that in *People v Johnson*, 488 Mich 860; 788 NW2d 10 (2010), the Michigan Supreme Court remanded the case to this Court for consideration as on leave to appeal granted "whether the sentencing guidelines apply to conditions imposed by a court under MCL 762.13 of the Holmes Youthful Trainee Act." However, as the prosecution observes, this Court later dismissed the appeal in *Johnson* on the stipulation of the parties. *People v Johnson*, unpublished order of the Court of Appeals, entered February 4, 2011 (Docket No. 294396).

level C and offense variable level II, with a recommended minimum sentence range of 30 months to 50 months for the first-degree home-invasion convictions.[5] Further, the prosecution opines that no substantial and compelling reasons existed to depart downward from the guidelines range and that the trial court did not state that any such reason existed before it chose to sentence under the HYTA. However, as the prosecution acknowledges, the sentencing guidelines have not been held to apply to the decision whether to grant youthful-trainee status. Absent such authority, the trial court's decision should not be reviewed as a decision to depart from the guidelines. In any event, we need not address the sentencing guidelines given our conclusion that the trial court abused its discretion by granting youthful-trainee status in light of the relevant circumstances discussed.

Reversed and remanded for resentencing in all three cases, at which time defendant shall have an opportunity to withdraw any conditional guilty pleas predicated on HYTA status being granted. We do not retain jurisdiction.

DONOFRIO, P.J., concurred with RONAYNE KRAUSE, J.

STEPHENS, J. (*dissenting*). I write to respectfully dissent from the conclusion of the majority that the trial court abused its discretion by affording the defendant status under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, through a sentence that requires incarceration, participation in treatment programs, employment, and a return to school. While I agree that the majority has correctly articulated the law applicable to this circumstance, I do not share its view that the trial

[5] See MCL 777.63.

court has sufficiently articulated the reasons for the sentence imposed and, therefore, would remand for further articulation of that reasoning.

HYTA is one of the possible sentencing options afforded to trial courts. Like every other sentencing option, there are four purposes of a HYTA sentence: protection of society, punishment of the offender, deterrence from further criminality by the offender or others, and rehabilitation. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 661-662; 620 NW2d 19 (2000). As with all sentences in Michigan, the sentence must be particularized to the individual and the offense. The majority correctly notes that if the trial court's basis for the sentence was to protect and preserve defendant's family, that reason is not within the range of principled outcomes, in part because it is a sentence that is not rooted in factors peculiar to the defendant himself. After all, every offender has some form of family. However, after a careful reading of a fairly lengthy sentencing transcript, I am not left with a firm conviction that protection or preservation of defendant's family was either the sole or the primary purpose of the HYTA sentence.

In a freewheeling colloquy with defendant, the trial court discussed defendant's immaturity and his intense desire to fit into some group as a result of his feelings of academic inferiority. It appears that, from that dialogue, the court implicitly found defendant to be more of follower than a leader. The court seemed to perceive that, in part because of his family support, immaturity, insecurity, and developing self-examination, he was susceptible to rehabilitation. The court ordered his participation in jail programming, albeit without nominating specific programs, as an aid to the rehabilitative process. In fact, the court required that this defendant

be exempt from jail crowding release without the trial court's permission. That caveat would allow the trial court to review not only whether defendant participated in jail programming, but also whether he benefited from the programming, much in the same manner as a court would monitor compliance with a parent-agency agreement. A failure to benefit or participate might well be a basis to revoke HYTA status. The court emphasized that failure to meet his HYTA requirements could result in a sentence that would dwarf the presumptive sentence under the sentencing guidelines that he would face had he not been granted HYTA status. This warning addresses the deterrence aspect of sentencing. The incarceration would have addressed the goals of punishment of the offender and protection of society.

While I do not believe that the trial court based its extraordinary sentence on the desire to preserve and protect defendant's family, it is unclear which factors ultimately did motivate the court's decision to exercise its discretion in this manner. I believe a remand for a full articulation of the basis of the trial court's decision is required, and I would remand the case to accomplish that objective.

PEOPLE v DOUGLAS

Docket No. 301546. Submitted January 5, 2012, at Detroit. Decided April 12. 2012, at 9:00 a.m.

Jeffery Alan Douglas was convicted of first-degree criminal sexual conduct (victim under the age of 13) and second-degree criminal sexual conduct (victim under the age of 13) following a jury trial in the Lenawee Circuit Court, Margaret M. S. Noe, J. The charges arose from statements by his daughter, KD, that defendant had made her touch his penis on one occasion and had her perform fellatio on a separate occasion. Defendant appealed, challenging the admission of certain testimony and claiming the ineffective assistance of counsel.

The Court of Appeals *held*:

1. Under MRE 803A, the tender-years hearsay exception, a statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, if (1) the declarant was under the age of 10 when the statement was made, (2) the statement is shown to have been spontaneous and without indication of being manufactured, (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance, and (4) the statement is introduced through the testimony of someone other than the declarant. If the declarant made more than one corroborative statement about the alleged incident, only the first is admissible under MRE 803A. Questioning by an adult is not incompatible with a ruling that a child's hearsay statement was spontaneous under MRE 803A. For a child's report of sexual abuse to have been spontaneous, the child must have broached the subject of sexual abuse and any questions from adults must have been nonleading or open-ended.

2. Defense counsel failed to object to the admission of KD's hearsay statement to Jennifer Wheeler during a forensic interview at Care House. The statement—that defendant made her "suck his peepee"—should not have been admitted under MRE 803A(2), because it was not spontaneous. Wheeler prompted KD during the

interview, KD had already talked with her therapist about the alleged sexual abuse, and KD's mother had told her during the drive to Care House that KD was going to be interviewed. KD's statement to Wheeler was also not admissible under MRE 803A(3) because there was no indication that the almost one-year delay in making the statement had been caused by fear or another equally effective circumstance. KD's young age, without more supporting testimony, was not an equally effective circumstance that would explain the lack of disclosure for such a long time. The statement was also inadmissible under MRE 803A because KD's first corroborative statement was to her mother, not to Wheeler during the interview at Care House.

3. While KD's statement to Wheeler that she and her stepsister had touched defendant's penis on another occasion was the first corroborative statement regarding that incident, it was inadmissible under MRE 803A because it was not spontaneous and there was no indication that the almost one-year delay in making the statement had been caused by fear or another equally effective circumstance.

4. The trial court erred by admitting over defense objection the videotape of KD's Care House interview because KD's statements to Wheeler were inadmissible under MRE 803A. The testimony of KD's mother regarding KD's statement to her about the alleged incident of fellatio with defendant, admitted without objection, was also inadmissible under MRE 803A.

5. It is improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury. Without objection from defense counsel, Michigan State Police Detective Sergeant Gary Muir testified about a recorded conversation that KD's mother had with defendant at Muir's request. Muir improperly vouched for KD's credibility when he testified about the mother's conversation with defendant regarding the sexual abuse allegations and about the mother's comment to defendant that KD does not lie. The unchallenged testimony of a Child Protective Services worker that she would not have filed the petition against defendant in a child protective proceeding if she had not believed and substantiated KD's allegations and that there was no indication that KD was being untruthful was similarly inadmissible because she directly commented on KD's credibility and bolstered the allegations against defendant.

6. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that there

exists a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal when any one of the errors alone would not merit reversal. A new trial is warranted if the combination of errors denied the defendant a fair trial. The cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted. There is a strong presumption that counsel's performance constituted sound trial strategy, and a particular trial strategy does not constitute ineffective assistance merely because it does not work.

7. Defendant was denied the effective assistance of counsel because of his counsel's failure to object to the hearsay testimony of multiple witnesses, the improper admission of KD's Care House interview, and the testimony that improperly bolstered KD's credibility fell below an objective standard of reasonableness. Defense counsel's failure to object to the testimony did not support his trial strategy—convincing the jury that KD was not believable—because the witnesses' testimony was consistent and did not demonstrate that KD gave different versions of events. Further, defense counsel failed to impeach KD with her preliminary examination testimony, which contradicted some of her trial testimony and would have supported defense counsel's trial strategy. The cumulative effect of the errors undermined confidence in the reliability of the verdict.

8. A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process. A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer. The defendant must show that there was a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction, sentence, or both would have been less severe than under the judgment and sentence in fact imposed. Counsel's assistance must be sufficient to enable the defendant to make an informed and voluntary choice between trial and a guilty plea. When charged with a crime having a mandatory minimum sentence, a defendant must receive information regarding the mandatory minimum sentence to make an informed decision whether to accept the prosecution's plea offer. Defendant was offered the option of pleading guilty to fourth-degree criminal sexual conduct on the morning of trial. Defendant's counsel advised him that he would receive at most 10 months in jail with the requirement that he register as a sex offender and erroneously informed defendant that he could receive up to a 20-year sentence if convicted of first-

degree criminal sexual conduct, but would most likely receive a minimum sentence between 5 and 8 years. Defense counsel's failure to inform defendant that he would receive a 25-year mandatory minimum sentence if convicted of first-degree criminal sexual conduct fell below an objective standard of reasonableness and resulted in the ineffective assistance of counsel. Defendant maintained that he would have accepted the plea offer had he known about the mandatory minimum sentence and established prejudice through the more severe sentences imposed.

9. Because defendant was denied the effective assistance of counsel at both the plea bargain and trial stages his convictions and sentences had to be vacated and the case remanded for the prosecution to reinstate the plea offer made immediately before trial. If defendant refused to accept the plea, he would be eligible for a new trial.

Convictions and sentences vacated; case remanded.

RONAYNE KRAUSE, J. concurring, agreed with the majority in all respects, with the exception that she would have held that KD's statement to her mother was admissible under MRE 803A(3). Fear or some analogue thereof is not the only basis for excusing a delay under MRE 803A(3). Rather, by also excusing delay for an "other equally effective circumstance," the rule requires any circumstance that would be similar in its effect on a victim as fear in inducing a delay in reporting, not a circumstance that is necessarily similar in nature to fear. Nor does the rule require that the defendant have created the equally effective circumstance. Given her age, KD might not have understood the concept of time or understood why the abuse was something she should have reported.

1. EVIDENCE — HEARSAY — TENDER-YEARS EXCEPTION.

The tender-years hearsay exception provides that a statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding if (1) the declarant was under the age of 10 when the statement was made, (2) the statement is shown to have been spontaneous and without indication of being manufactured, (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance, and (4) the statement is introduced through the testimony of someone other than the declarant; if the declarant made more than one corroborative statement about the alleged incident, only the first is

admissible; questioning by an adult is not incompatible with a ruling that a child's hearsay statement was spontaneous; for a child's report of sexual abuse to have been spontaneous, the child must have broached the subject of sexual abuse and any questions from adults must have been nonleading or open-ended; a child's young age, without more supporting testimony, does not constitute an equally effective circumstance that would explain the lack of disclosure for a lengthy period and excuse the delay (MRE 803A).

2. CRIMINAL LAW — EFFECTIVE ASSISTANCE OF COUNSEL — CUMULATIVE ERROR.

The cumulative effect of errors can constitute sufficient prejudice to warrant reversal on the ground of ineffective assistance of counsel when any one of the errors alone would not merit reversal; a new trial is warranted if the combination of errors denied the defendant a fair trial; the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial will be granted.

3. CRIMINAL LAW — EFFECTIVE ASSISTANCE OF COUNSEL — PLEA-BARGAINING PROCESS — MANDATORY SENTENCES.

A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process; an ineffective-assistance-of-counsel claim may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer; the defendant must show that there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction, sentence, or both would have been less severe than under the judgment and sentence in fact imposed; counsel's assistance must be sufficient to enable the defendant to make an informed and voluntary choice between trial and a guilty plea; a defendant must receive information regarding a mandatory minimum sentence to make an informed decision whether to accept the prosecution's plea offer.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Jonathan L. Poer*, Prosecuting Attorney, for the people.

Joan Ellerbusch Morgan for defendant.

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under 13 years of age), and second-degree CSC, MCL 750.520c(1)(a) (victim under 13). Because defendant was denied the effective assistance of counsel during both the pretrial and trial proceedings and the cumulative effect of the trial errors denied him a fair trial, we vacate his convictions and sentences and remand to the trial court for reinstatement of the prosecution's plea offer. If defendant refuses to accept the offer, he is entitled to a new trial.

I. TRIAL ERRORS

Defendant argues that the trial court erroneously admitted the testimony of several witnesses as well as a videotape of the child complainant's Care House interview. Some of defendant's claims of error are preserved for our review and some are not. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review for an abuse of discretion a preserved challenge to the admission of evidence. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id.* at 588-589. This Court reviews for plain error unpreserved challenges regarding the admission of evidence that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). When considering an unpreserved error, a reviewing court will reverse "only when the defendant is actually innocent or the error seriously

affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 774.

Defendant contends that the trial court erred by admitting, under MRE 803A, Jennifer Wheeler's testimony regarding the statements that the child, KD, made to Wheeler during an interview at Care House. MRE 803A, the "tender years" hearsay exception, states in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

Defendant contends that Wheeler's testimony was inadmissible under MRE 803A because (1) the statements were elicited during a forensic interview and were therefore not spontaneous, (2) the statements were made more than one year after the alleged incidents and there is no indication that fear or another equally effective circumstance caused the delay, and (3) the statements should not have been "broken up" into two segments regarding each of the alleged acts. Because defendant did not challenge

the admissibility of the statements on this basis below, that argument is not preserved for our review. Having reviewed the record, we conclude that Wheeler's testimony regarding KD's statements was not properly admissible under MRE 803A.

Whether KD's statements to Wheeler were "spontaneous" within the meaning of MRE 803A is a close question. In *People v Gursky*, 486 Mich 596, 614; 786 NW2d 579 (2010), our Supreme Court held that questioning by an adult "is not incompatible with a ruling that the child produced a spontaneous statement." The Court explained, however, that "for such statements to be admissible, the child must broach the subject of sexual abuse, and any questioning or prompts from adults must be nonleading or open-ended in order for the statement to be considered the creation of the child." *Id.* KD broached the subject of sexual abuse after Wheeler told KD that children tell her things that have happened to them, including secrets and things that people tell the children not to say. Wheeler and KD engaged in the following discussion:

> *Ms. Wheeler*: Well, you know what, [KD], I'm gonna tell you a little bit about me and this place here, okay? All right. My name's Jennifer just in case you forgot that. This place here is called Care House, and we call it Care House not because anyone lives here—
>
> [*KD*]: Um-hum.
>
> *Ms. Wheeler*: —just because everyone who works here really cares about kids. You know what my job is here at Care House?
>
> [*KD*]: M-mm.
>
> *Ms. Wheeler*: It's to listen and talk with kids. That's what I do every single day all day long. I talk to little kids. I talk to older kids like you. Sometimes even teenagers.
>
> [*KD*]: Teenagers?

> *Ms. Wheeler*: Yeah, teenagers. And when I talk to kids, they tell me everything. They tell me about their friends and their families. They tell me about their moms and their dads. They tell me about things that happen to them. Things that they saw. Things that they heard. They tell me about worries and problems. They tell me about secrets. They even tell me about things that people tell them not to tell, and that's okay because as long as you talk to me today, you get to tell me anything and everything that you want. Okay?
>
> [*KD*]: Know what, my daddy makes me suck his peepee.

Considering Wheeler's prompting, the fact that KD had already talked to her therapist about the alleged sexual abuse, and the fact that KD's mother had told her during the 45- to 60-minute drive that she was going to be interviewed, KD's statements to Wheeler were arguably not spontaneous.

More certain for purposes of MRE 803A is that KD's statements to Wheeler were not made immediately after the incidents and there is no indication that the delay was caused by fear or another "equally effective circumstance." In fact, KD did not make the statements until approximately one year after the alleged incidents. KD's mother testified that KD had told her about the sexual abuse "out-of-the-blue" while they were in the car. KD's Care House interview occurred soon thereafter. The prosecution suggests that the delay was excusable because of KD's "extreme youth," but nothing in the record indicates that KD's age was a reason for the delay. We note that KD was approximately 3½ years old at the time of the alleged incidents and did not disclose the abuse for approximately one year. KD's youth, without more, is not an equally effective circumstance that sufficiently explains why she did not disclose the abuse for such a long time. Without any explanation regarding the cause of the delay, let alone an indication

that fear or a similar circumstance was the reason for the delay, KD's statements to Wheeler were inadmissible under MRE 803A(3). A trial court abuses its discretion when it admits evidence that is legally inadmissible as a matter of law. *Gursky*, 486 Mich at 606.

KD's statement to Wheeler regarding sucking defendant's "peepee" was also inadmissible under MRE 803A because it was not KD's first corroborative statement about that incident. KD made the first corroborative statement about that incident to her mother rather than Wheeler. Thus, Wheeler's testimony that KD told her that defendant made her suck his "peepee" was inadmissible under MRE 803A.

Wheeler also testified that KD told her that she and her stepsister had touched defendant's penis on one occasion. This incident was separate from the incident during which the alleged oral sex occurred. While KD's statements regarding the touching incident were the first corroborative statements regarding that incident, Wheeler's testimony regarding the statements was nevertheless inadmissible because not all the requisites of MRE 803A were satisfied, as discussed earlier. Thus, KD's statements to Wheeler regarding both incidents were inadmissible under MRE 803A.

Defendant next argues that the trial court erred by admitting the videotape of KD's Care House interview. Over defense counsel's objection that the videotape was inadmissible under MRE 803A, the video was played before the jury. Because KD's statements to Wheeler, depicted in the video, were inadmissible under MRE 803A, the admission of the videotape was also erroneous.[1]

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[1] We reject the prosecution's argument that KD's statements to Wheeler and the videotape were admissible under MRE 803(24), the "catchall exception" to the hearsay rule. To be admissible under that rule, a statement must have "circumstantial guarantees of trustworthiness equivalent to

Defendant next contends that KD's credibility was improperly bolstered when the trial court admitted the hearsay testimony of KD's mother, JB, who testified that while riding in the car one day, KD spontaneously said, "I sucked my daddy's peepee until the milk came out, and my daddy said, oh, yeah, that's how you do it." Defense counsel did not object to the testimony, which constituted inadmissible hearsay. Although the prosecution argues that the testimony was admissible under MRE 803A, the statement was not made immediately after the incident and there is no indication that fear or another equally effective circumstance caused the delay. Thus, the testimony was inadmissible under MRE 803A.[2]

Defendant next argues that the trial court erred by admitting the hearsay testimony of Michigan State Police Detective Sergeant Gary Muir, which improperly vouched for KD's credibility. "It is generally improper

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those of the categorical hearsay exceptions." *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003). This requirement was not met in this case because the allegations arose approximately one year after the alleged incidents and immediately after defendant and his fiancée were married and discovered that they were expecting a baby. Defendant's wife testified that KD's mother was jealous and often telephoned defendant. Unlike the interview in *Katt*, the interview in this case occurred because of the sexual abuse allegations, and KD was aware that she was going to be interviewed. See *id.* at 275-276. Further, during the interview, KD told Wheeler that she had to talk to her mother "for a minute" because she had to tell her mother what Wheeler had told her. Thus, the statements that KD made to Wheeler did not have circumstantial guarantees of trustworthiness equivalent to those of other hearsay exceptions, and the circumstances of this case are distinguishable from those in *Katt*.

[2] As previously recognized, the record fails to indicate any reason for KD's yearlong delay in disclosing the alleged abuse. Thus, on this record, KD's statement to JB was inadmissible under MRE 803A. We note, however, that if this case is retried and the prosecution is able to establish that fear or another equally effective circumstance caused the delay, KD's statement to JB may be properly admissible under MRE 803A. We emphasize that our determination regarding this issue is based on the record before us.

for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

At trial, Muir testified about a recorded telephone conversation that JB had with defendant at Muir's request. When asked about the context of the conversation, Muir testified:

> *A.* She [JB] was asking—she was telling him basically what [KD] had talked about, and based on that information, he was talking to her back about it, too.
>
> *Q.* Okay, well, let's cut right to it. Did she tell or do you recall did she tell the defendant the allegations that [KD] had made?
>
> *A.* Yes, she did.
>
> *Q.* Okay, what specifically do you recall her telling the defendant?
>
> *A.* That [KD] had said that she had sucked on her dad's peepee and stuff came out basically.
>
> *Q.* Okay, and you recall her actually telling the defendant that on the telephone.
>
> *A.* Yes.
>
> *Q.* All right, and what was his response if you can recall?
>
> *A.* He didn't know, y'know, why she was saying that basically.
>
> *Q.* Okay. Did she make any other inquiries of the defendant on the telephone?
>
> *A.* Yeah. Without reviewing the tape, I recall there was other conversation, and she was just basically trying to get to the bottom of, y'know, I know my daughter don't lie; why is she making these allegations then; was there anything that happened that, y'know, she might have seen or observed that would cause her to say this happened?

* * *

Q. Was there ever any discussion about an incident that may have occurred where it was acknowledged that [KD] touched the defendant?

A. There were actually—actually two incidents. One was touching, and one was when he was actually—another time, and I don't know what the time sequence was. There was one where he had made a comment about [KD] touching him and he's find—waking up or something to that effect, and he said that he told her [JB] about that, and she [JB] didn't recall that.

Muir's testimony, which was admitted without any objection by defense counsel, constituted inadmissible hearsay and tended to bolster KD's credibility. As such, it was not properly admissible.

Defendant also argues that the testimony of Child Protective Services worker Diana Fallone was inadmissible because it improperly vouched for KD's credibility. Again, defense counsel did not object to the testimony. Fallone testified that she filed a petition in a child protective proceeding based on KD's allegations. She further testified as follows:

Q. If you thought the child was lying, and I don't mean this particular case, but any case—

A. Right.

Q. —you thought the child was lying, would you still seek a petition?

A. No.

* * *

Q. In this case before us now regarding [KD]—

A. Um-hum.

Q. Is that a yes?

A. Yes.

Q. Okay.

A. Sorry.

Q. Did—did you—was this investigation that you've described to us, was it completed?

A. Yes.

Q. Okay, and you're indicating that you sought the court's assistance, you filed a petition in a child protection proceeding in Oakland County, correct?

A. Correct.

Q. All right. Does that—can that lead us to the conclusion that you found that the allegations had been substantiated?

A. Yes.

In addition, Fallone testified that "there was no indication that she [KD] was coached or being untruthful[.]" Fallone's testimony directly commented on KD's credibility and bolstered the allegations against defendant. Accordingly, the testimony was not properly admissible.[3] *Dobek*, 274 Mich App at 71.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to object to the erroneous admission of the testimony previously discussed. He also contends that his counsel rendered ineffective assistance by failing to impeach KD with her preliminary examination testimony. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial

[3] We note that it was permissible for Fallone to testify in the abstract regarding characteristics consistent or inconsistent with coached allegations. Her testimony that she conducted an investigation before seeking a petition was likewise permissible. The error occurred when Fallone was permitted to render an opinion specifically regarding KD's credibility. That testimony improperly vouched for KD's credibility and was inadmissible. *Dobek*, 274 Mich App at 71.

court's findings of fact and de novo its conclusions of law. *Id.* To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). A defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defense counsel testified at a *Ginther*[4] hearing that his trial strategy was to convince the jury that KD was not believable, that JB had coached KD to make the allegations because JB disliked defendant, and that KD had told different versions of the story to different people. Defense counsel claimed that his failure to object to the testimony of witnesses other than Wheeler supported his trial strategy because their testimony showed that KD had told different stories to different people. We recognize that a particular trial strategy does not constitute ineffective assistance of counsel merely because it does not work. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). We conclude, however, that counsel's failure to object to the hearsay testimony and the testimony that improperly bolstered KD's credibility fell below an objective standard of reasonableness because the witness testimony was, on the whole, consistent and did not demonstrate that KD had given different versions of events. Further, defense counsel's failure to object to the testimony that bolstered KD's credibility did not support his trial strategy of convincing the jury that KD was not believable.

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[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The first witness to testify at trial was KD herself, who testified that she "sucked [her] daddy's peepee." She claimed that she touched defendant's penis with her hands on one occasion and with her mouth on another occasion. She further testified that "milk" came out of defendant's "peepee," which tasted "like peepee and regular milk." KD denied telling JB that the "milk" tasted like cherry. Thereafter, JB testified without objection that KD had told her that she "sucked [her] daddy's peepee until the milk came out, and [her] daddy said, oh, yeah, that's how you do it." This testimony was hearsay, as previously discussed, and was consistent with and bolstered KD's testimony. Upon questioning by defense counsel, JB testified that KD had never told her that the "milk" tasted like cherry, but she recalled KD testifying to that effect "at the preliminary thing." Defense counsel did not impeach KD with her preliminary examination testimony that the "milk" tasted like cherry.

Defense counsel also permitted Muir to testify without objection that JB had telephoned defendant and asked him about KD's allegation that "she had sucked on her dad's peepee and stuff came out[.]" As previously discussed, Muir repeated JB and defendant's conversation, including JB's inquiry of defendant regarding why KD was making the allegation because KD does not lie. Muir also testified that defendant admitted that he awoke on one occasion to discover KD touching his penis. Defendant told JB that he had previously told her about that incident, but JB did not recall defendant mentioning it. As discussed, this testimony constituted hearsay and improperly bolstered KD's credibility.

In addition, defense counsel allowed Fallone to testify without objection that she found KD's allegations credible and that there was no indication that KD had been

coached. Also, as previously discussed, this testimony was improper, and counsel's failure to object was not consistent with his trial strategy of discrediting KD. At the *Ginther* hearing, counsel testified, "[I]f somebody was saying it's my opinion that she's being truthful, I believe I would have objected to that." To the contrary, counsel failed to object to Fallone's testimony that bolstered KD's testimony.

Further, defense counsel failed to impeach KD with her preliminary examination testimony, during which she made several statements that supported counsel's trial strategy. In particular, KD testified that her mouth never touched defendant's penis, that her mother "wanted [her] to tell you people [she] sucked it" and that "milk" came out, and that her mother wanted her to "tell a lie that [she] didn't know anything about[.]" Although KD also made inconsistent statements at the preliminary examination that tended to support her allegations, there was no logical reason for counsel not to impeach KD's trial testimony with her preliminary examination testimony because it supported counsel's theory that KD was not credible and that JB had coached her to make the allegations. Such impeachment would have supported counsel's strategy, discussed at the *Ginther* hearing, to convince the jury that "the young lady was testifying as to what she thought happened, but . . . she really had no idea what had happened."

After reviewing the record, we conclude that counsel's ineffective assistance, in addition to the erroneous admission of the Care House interview and Wheeler's testimony regarding KD's statements, denied defendant a fair trial. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit

reversal . . . ." *Dobek*, 274 Mich App at 106. A new trial is warranted if the combination of errors denied the defendant a fair trial. *Id.* "[T]he cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Id.*

Defense counsel's failure to object to the hearsay testimony that repeated and bolstered KD's testimony in combination with Wheeler's erroneously admitted testimony and the improper admission of KD's Care House interview undermined the reliability of the verdict. Perhaps the most damning evidence was the video of KD's Care House interview, which depicted then four-year-old KD saying, "[M]y daddy makes me suck his peepee," "I just sucked it because I know how to suck peepee," and "milk" came out. The video further depicted Wheeler and KD's discussion as follows:

Q. And what did—what did it taste like?

A. Taste like peepee.

Q. Tastes like peepee. And where did the white stuff like milk go? Where did it go?

A. Like this. Like this. It goed like all the way up. And I—I like drinked it, and I said, pew, that's yuk.

Q. You said you drank it, and you said, pew, that's yuk?

A. [Nods head]

Q. Okay, and then where did it go?

A. Hm?

Q. Did it go—where did it go? Where did all the white stuff like milk go?

A. In my mouth.

Q. In your mouth, okay. And—and where did it go once it went in your mouth?

A. It—[points to her throat]

The cumulative effect of the errors denied defendant a fair trial and undermined confidence in the reliability of the verdict. *Id*.

The prosecution argues that a new trial is not warranted because when Officer Larry Rothman confronted defendant with the allegations, defendant merely responded that he "did not remember" engaging in oral intercourse with KD. On this point, however, Rothman's testimony was equivocal. Rothman testified that when he first asked defendant about the allegations, defendant responded, "[N]o, it didn't happen." Thereafter, Rothman questioned defendant further. With respect to the additional questioning, Rothman testified that defendant's statement that he did not remember was made in response to Rothman's direct question about whether defendant remembered an incident in which he ejaculated into KD's mouth. Defense counsel clarified Rothman's testimony as follows:

> *Q.* Well, the point I'm getting to, detective, is I don't want anybody to be under any misunderstanding that you looked at [defendant] and said, did you sexually assault your daughter, and him saying I can't remember doing that. The issue is you asked him do you remember and then him saying I don't remember.
>
> *A.* Right, that's correct.

On redirect, Rothman testified that defendant's response that he did not remember was in response to both direct questioning about whether the incident occurred and questioning regarding whether defendant remembered the conduct occurring. In light of the extensive errors that permeated defendant's trial, Rothman's testimony is not sufficient to surmount our conclusion that defendant was denied a fair trial and

that the errors undermined the reliability of the verdict. We therefore vacate defendant's convictions and sentences.

II. PRETRIAL ERRORS

Defendant also argues that he was denied the effective assistance of counsel at the pretrial stage of the proceeding because counsel failed to inform him that he would be subject to a 25-year mandatory minimum sentence if he was convicted of first-degree CSC and because counsel erroneously advised him that he would not be able to live with his children if he was required to register as a sex offender pursuant to the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. Again, we conclude that counsel's performance was constitutionally deficient. We further conclude that counsel's deficient representation prejudiced defendant.

A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process. *Lafler v Cooper*, 566 US ___, ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer. *Hill v Lockhart*, 474 US 52, 57-58; 106 S Ct 366; 88 L Ed 2d 203 (1985). As for ineffective-assistance-of-counsel claims generally, if a defendant's claim is based on counsel's failure to properly advise the defendant with respect to a plea offer, the defendant must show that his or her attorney's performance " 'fell below an objective standard of reasonableness' " and that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473, 1481-1482; 176 L Ed 2d 284 (2010), quoting *Strickland v Washington*, 466

US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 US at ___; 132 S Ct at 1384. Counsel's assistance must be sufficient to enable the defendant "to make an informed and voluntary choice between trial and a guilty plea." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995).

Defense counsel's failure to inform defendant in this case that he would receive a 25-year mandatory minimum sentence if convicted of first-degree CSC fell below an objective standard of reasonableness. *Padilla*, 559 US at ___; 130 S Ct at 1482. MCL 750.520b(2)(b) clearly provides for a mandatory 25-year minimum sentence for a first-degree CSC violation that is "committed by an individual 17 years of age or older against an individual less than 13 years of age . . . ." Thus, counsel's advice to defendant that he could face up to a 20-year sentence, but would most likely be sentenced to a minimum term between 5 and 8 years in accordance with the sentencing guidelines, was erroneous. Moreover, the information regarding the mandatory minimum sentence was essential to enable defendant to make an informed decision about whether to accept the prosecution's plea offer or proceed to trial. *Corteway*, 212 Mich App at 446.

In *Lafler*, the Court articulated the standard that a defendant must establish in order to demonstrate prejudice in cases in which counsel's ineffective advice led the defendant to reject a plea offer and proceed to trial. The Court stated:

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented

> to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.[5]

Defense counsel's erroneous advice here prejudiced defendant. *On the morning of trial*, the prosecution offered defendant the option of pleading guilty of fourth-degree CSC. Defense counsel advised defendant that if he accepted the offer, the worst sentence that he could receive was 10 months in jail with the requirement that he register as a sex offender. Counsel testified at the *Ginther* hearing that if he had known that first-degree CSC carried a mandatory 25-year minimum sentence, he "would have absolutely pressed [defendant] and insisted that he take the deal." Moreover, defendant testified that, had his attorney advised him of the 25-year mandatory minimum sentence, he would have taken the plea offer because "[a] 25-year minimum is a lot different than the possibility of not going to prison." Defendant maintained that he would have accepted the plea offer even if doing so meant that he would have been permitted very little or no contact with his children. According to defendant, counsel erroneously advised him that he would not be permitted to reside with his children for as long as he was required to register as a sex offender. Defendant testified that he

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[5] *Lafler*, 566 US at ___; 132 S Ct at 1385. Similarly, the Court stated:

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence. [*Id.* at ___; 132 S Ct at 1387.]

did not learn until after trial that SORA would not have prohibited him from residing with his children and that counsel's misinformation regarding SORA contributed to his decision to reject the plea offer.[6] Although the trial court determined that no error had occurred because defendant was aware of the possibility that he could be sentenced to a 20-year term, there is a significant difference between the possibility of a 20-year term with the likelihood of serving a much shorter sentence and the certainty of serving a 25-year minimum term. Defendant has thus shown that the offer was valid, that he would have accepted the offer, and that his convictions and sentences would have been much less severe than those that were imposed after trial. Therefore, defendant has established that counsel's failure to inform him of the actual consequences of accepting or rejecting the plea offer prejudiced him. *Lafler*, 566 US at ___; 132 S Ct at 1384.

Having concluded that defendant satisfied both prongs of the *Strickland* test, we must now determine the appropriate remedy. In doing so, we note that the circumstances of this case are very similar to those in *Lafler*, in which the respondent had rejected two plea offers on the basis of defense counsel's erroneous advice and was convicted following trial. *Id*. at___; 132 S Ct at 1383. The parties agreed that counsel's performance was constitutionally deficient and that the respondent had established the requisite prejudice. *Id*. at ___; 132 S Ct at 1384, 1386,

[6] In *People v Fonville*, 291 Mich App 363, 394-395; 804 NW2d 878 (2011), this Court held that defense counsel's representation was constitutionally defective because counsel had failed to advise the defendant that pleading guilty would require him to register as a sex offender pursuant to SORA. Although defense counsel advised defendant in this case that he would be required to register as a sex offender, counsel erroneously informed defendant that his registration would preclude him from living with his children for the duration of his registry, or 20 years.

1391. The Court noted that "Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation' " and "must 'neutralize the taint' of a constitutional violation. . . ." *Id*. at ___; 132 S Ct at 1388, quoting *United States v Morrison*, 449 US 361, 364-365; 101 S Ct 665; 66 L Ed 2d 564 (1981). The Court concluded:

> The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. See Mich. Ct. Rule 6.302(C)(3) (2011) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement"). Today's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case. [*Lafler*, 566 US at ___; 132 S Ct at 1391.]

The instant case differs from *Lafler* in one material respect. In this case, defendant was denied the effective assistance of counsel at both the plea bargain and trial stages of the proceeding.[7] Accordingly, taking this circumstance into consideration, we vacate defendant's convictions and sentences and remand to the trial court for the prosecution to reinstate its plea offer made immediately before trial. If defendant refuses to accept the plea offer, he is entitled to a new trial.[8]

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[7] The respondent in *Lafler* was convicted following a fair trial, free of constitutional error. See *Lafler*, 566 US at ___; 132 S Ct 1385-1388.

[8] We note that it does not appear from the record that the prosecution offered defendant a plea agreement, as was the case in *Lafler*. See *Lafler*, 566 US at ___; 32 S Ct at 1383, 1387, 1391.

Defendant's convictions and sentences are hereby vacated, and this case is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

DONOFRIO, P.J., and STEPHENS, J., concurred.

RONAYNE KRAUSE, J. (*concurring*). I agree and concur with the majority in all respects other than the majority's conclusion that KD's statement to her mother was not admissible pursuant to MRE 803A. Under the circumstances of this case, I would not reverse the admission of KD's report of the abuse to her mother under MRE 803A(3). Because, for the other reasons discussed by the majority, this matter must be remanded for a new trial irrespective of the admissibility of that statement, I concur in the result. However, I write separately to address the concerns I have regarding what constitutes an excusable delay in reporting under MRE 803A(3).

The so-called "tender-years exception" to the hearsay evidence rule originated in *People v Gage*, 62 Mich 271; 28 NW 835 (1886). At that time, the exception specifically discussed delays in making a complaint being excusable only if caused by "silence [as] the direct consequence of fears of chastisement induced by threats of the perpetrator of the wrong." *Id*. at 274. The alternative of excusing delay caused by "other equally effective circumstance" was appended to that rule by our Supreme Court in *People v Baker*, 251 Mich 322, 326; 232 NW 381 (1930). Importantly, the Court in that case discussed a delay after the defendant, who was the father of the victim, simply told the victim not to tell anyone else. The Court held that the delay was excusable because

> [a] child would ordinarily have no sense of outrage at such acts by her own father, and complaining of them would not occur to her. Her telling of the affair would more naturally arise as the relation of an unusual occurrence and might be delayed until something arose to suggest it. [*Id*.]

The Court opined that a mere admonition by the victim's father to not tell anyone what happened was "as effective to promote delay as threats by a stranger would have been." *Id*.

I understand MRE 803A to be nothing but a codification of the old common-law tender-years rule, which our Supreme Court held in 1982 did not survive the adoption of the then new Rules of Evidence. *People v Kreiner*, 415 Mich 372, 377-378; 329 NW2d 716 (1982). Although I cannot find any cases directly under MRE 803A that are helpful in explaining what an "other equally effective circumstance" might be, I think that *Baker* is not only relevant, but binding. Therefore, fear or some analogue thereof is not the only basis for excusing a delay under MRE 803A(3). Rather, MRE 803A(3) requires any circumstance that would be similar *in its effect* on a victim as fear in inducing a delay in reporting, not a circumstance that is necessarily similar *in nature* to fear. Indeed, the plain language of the rule explains that it must be an "equally *effective* circumstance," not necessarily a *similar* one. Nothing in the rule even requires that any "other equally effective circumstance" must have been affirmatively created by the defendant.

The abuse in question occurred in mid-May to June 2008. At that time, KD was living with defendant, apparently because of some kind of involvement by Child Protective Services. KD did not return to living with her mother until the next January, approximately eight months later. KD was, moreover, approximately

3 1/2 years old at the time of the abuse. KD's mother and the Care House interviewer both explained that four-year-olds do not understand "concepts of time." Given that KD was living with defendant until January 2009, she may not have had a realistic opportunity to report the abuse for most of the year it took her to do so. The delay in disclosure would not likely have been subjectively apparent to her, and, as *Baker* suggests, KD would not necessarily have even understood at her age why the abuse was something she should report to anyone. Even if she had appreciated the nature of the acts, it is common and basic knowledge of how human beings operate that shame and confusion are powerful motivators of silence.

This is not to say that I do not find the record disappointing. It certainly would have been better had some kind of explicit record been made directly explaining why KD's disclosure did not occur until approximately a year after the abuse took place. Had defendant objected to the admission of this testimony at trial, a record like this one might not be sufficient to permit the admission of KD's disclosure to her mother to stand. However, had defendant objected, the prosecution would have had an opportunity to make that record. I do not decide that question, though. As the matter is before us, our review of this *unpreserved* evidentiary challenge is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Consequently, reversal is not warranted merely because an error occurred, but "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 774.

Under the totality of the circumstances of this case, I would conclude that plain error affecting defendant's

substantial rights did not occur and, consequently, I would not reverse the admission of KD's disclosure of the abuse to her mother. However, because this matter must be remanded for a new trial in any event, I concur with the majority.

In re WATERS DRAIN DRAINAGE DISTRICT

Docket No. 298873. Submitted November 9, 2011, at Grand Rapids. Decided April 17, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 871.

The Kent County Drain Commissioner apportioned the cost of improvements to the Waters Drain to property owners located in the Waters Drain Special Assessment District. Arath IV, Inc., and Bomarko, Inc., owners of land within the special assessment district, appealed the apportionment in the Kent County Probate Court. The court, David M. Murkowski, J., appointed a three-member board of review that subsequently rejected Arath and Bomarko's challenge and upheld the commissioner's apportionment. The court then ordered Arath and Bomarko to pay the commissioner's attorney fees and to compensate each board of review member $500, plus travel expenses. Arath and Bomarko appealed in the Kent Circuit Court, challenging the probate court's assessment of attorney fees and the amount of compensation awarded to the members of the board of review. The circuit court, Mark A. Trusock, J., affirmed the order of the probate court. The Court of Appeals granted Arath and Bomarko leave to appeal.

The Court of Appeals *held*:

1. MCL 280.158 provides that when the apportionment of the commissioner is sustained by a board of review, the appellant shall pay "the whole costs and expenses" of the appeal. The Drain Code, MCL 280.1 *et seq*., does not define the term "whole," but a dictionary defines it as comprising the full quantity or amount and entire or total. The Legislature, by using the expansive term "whole," intended that a landowner appealing an apportionment must pay the entire or total amount of costs and expenses of the appeal if that apportionment is sustained. The legal expenses of the commissioner in defending the appeal constituted a portion of the entire or total costs or expenses of the appeal. The phrase "whole costs and expenses" in MCL 280.158 thus encompasses attorney fees.

2. Compensation for board of review members is included in the broad "whole costs and expenses" language of MCL 280.158. The

probate court did not abuse its discretion under the circumstances of this case by compensating the board of review members in the amount of $500 each.

Affirmed.

DRAINS — APPORTIONMENTS — APPEALS — COSTS — EXPENSES — ATTORNEY FEES — BOARD OF REVIEW MEMBERS' COMPENSATION.

When the apportionment of the costs of improvements by a drain commissioner under the Drain Code is sustained by a board of review, the landowner appealing the apportionment must pay the entire or total amount of the costs and expenses of the appeal, including the commissioner's attorney fees and compensation for the members of the board of review (MCL 280.158).

Rhoades McKee PC (by *Gregory G. Timmer* and *Patrick R. Drueke*) for Arath IV, Inc., and Bomarko, Inc.

The Hubbard Law Firm, PC (by *Michael G. Woodworth* and *Michelle M. Brya*), for the Kent County Drain Commissioner.

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM. Plaintiffs, Arath IV, Inc., and Bomarko, Inc., appeal by leave granted[1] a circuit court order affirming a probate court order awarding defendant, the Kent County Drain Commissioner, attorney fees under MCL 280.158 and compensating board of review members. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant undertook to make improvements to the Waters Drain and apportioned the cost of such improvements to property owners located in the Waters Drain Special Assessment District in accordance with the

[1] *In re Waters Drain Drainage Dist*, unpublished order of the Court of Appeals, entered February 28, 2011 (Docket No. 298873).

Drain Code, MCL 280.1 *et seq*. Plaintiffs owned land within the special assessment district. As permitted by MCL 280.155, plaintiffs appealed the apportionment in the Kent County Probate Court. The probate court appointed a three-member board of review. The board of review rejected plaintiffs' challenge and upheld defendant's apportionment. Thereafter, the probate court ordered plaintiffs to pay $6,659.97 for defendant's attorney fees and to compensate each board member in the amount of $500, plus travel expenses, for a total of $1,552.82. Plaintiffs appealed in the circuit court, which affirmed the probate court's award of attorney fees and compensation for the board members. Plaintiffs appeal by leave granted.

II. ANALYSIS

A. ATTORNEY FEES

Plaintiffs argue that the probate court erred by awarding defendant attorney fees under MCL 280.158.

"A trial court's grant of attorney fees is reviewed for an abuse of discretion." *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009). The abuse of discretion standard recognizes " 'that there will be circumstances in which . . . there will be more than one reasonable and principled outcome.' " *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, an abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

This case requires us to construe MCL 280.158. "Issues of statutory interpretation are questions of law

that are reviewed de novo." *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). "When interpreting statutory language, courts must ascertain the legislative intent that may reasonably be inferred from the words in a statute." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52-53; 760 NW2d 811 (2008). Unless defined in the statute, each word should be given its plain and ordinary meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). In the absence of a statutory definition of a term, a court may consult a lay dictionary to determine the meaning of a common word that lacks a unique legal meaning. *Id.* This Court should presume that each statutory word or phrase has meaning, thus avoiding rendering any part of a statute nugatory. *Allen*, 281 Mich App at 53.

A court may award costs and attorney fees only when specifically authorized by statute, court rule, or a recognized exception. MCL 600.2405(6); *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). MCL 280.158 provides:

> In case the apportionment of the commissioner shall be sustained by such board of review the appellant shall pay the whole costs and expenses of such appeal. Such costs and expenses shall be ascertained and determined by the judge of probate, and if not paid the appellant shall be liable on his bond for the full amount of such costs in an action at law, to be brought by the commissioner on the bond before any court having competent jurisdiction.

Plaintiffs argue that the "whole costs and expenses" language of MCL 280.158 does not encompass attorney fees. While the statute does not explicitly refer to attorney fees, it does provide that an "appellant shall pay the *whole* costs and expenses of such appeal." MCL 280.158 (emphasis added). The term "whole" is a com-

mon word that is not defined in the Drain Code. Therefore, it is appropriate to consult a dictionary for a definition of the term. *Brackett*, 482 Mich at 276. *Random House Webster's College Dictionary* (2d ed, 1997) defines the word "whole" as "comprising the full quantity or amount; entire or total[.]" Thus, use of the expansive term "whole" in MCL 280.158 evinces the Legislature's intent that a landowner appealing an apportionment must pay the entire or total amount of costs and expenses of the appeal in the event that the apportionment is sustained. Clearly, defendant would incur legal expenses in defending such an appeal, and these legal expenses would constitute a portion of the entire or total costs or expenses of an appeal. In light of the Legislature's use of the broad term "whole" to modify the phrase "costs and expenses," we conclude that the phrase "whole costs and expenses" of MCL 280.158 encompasses attorney fees.

In support of their argument, plaintiffs cite *In re Forfeiture of $10,780*, 181 Mich App 761; 450 NW2d 93 (1989). In that case, this Court construed a provision of the controlled substances act, MCL 333.7101 *et seq*., that stated, in relevant part: " '[If] the property is ordered forfeited by the court the obligor shall pay all costs and expenses of the forfeiture proceedings.' " *Id*. at 766, quoting MCL 333.7523(1)(c). This Court held that the statute did not allow the prosecutor to recover attorney fees and explained: "[T]he relevant provision, while providing for costs, does not specifically provide for attorney fees. Michigan adheres to the rule that attorney fees are not recoverable as an element of costs unless they are specifically authorized by statute, court rule or a recognized exception." *Id*.

We reject plaintiffs' reliance on *In re Forfeiture of $10,780* for two reasons. First, it did not involve the

same statute as the present case and the language is not the same. This case concerns a provision of the Drain Code that contains broad language giving the probate court discretion to determine the "whole costs and expenses" of the appellate proceeding. In contrast, *In re Forfeiture of $10,780* involved a provision of the controlled substances act that did not explicitly refer to the relevant court's discretion to decipher the costs and expenses of the forfeiture proceedings. Hence, that case does not govern our interpretation of MCL 280.158. Furthermore, *In re Forfeiture of $10,780* is of minimal persuasive value considering that this Court and our Supreme Court have previously held that an award of attorney fees was proper even though such fees were not explicitly referred to in the specific court rule or constitutional provision. See, e.g., *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 2 & n 2, 7-10; 564 NW2d 457 (1997) (holding that attorney fees were appropriate as costs under the Headlee Amendment, Const 1963, art 9, § 32, given that the amendment provided that the taxpayer "shall receive . . . his costs incurred" following a successful enforcement action); *Sirrey v Danou*, 212 Mich App 159, 160-161 & n 1; 537 NW2d 231 (1995) (holding that attorney fees were properly awarded under MCR 2.504(D) given that the rule provided the court discretion to order the payment of "such costs of the action . . . as it deems proper"); *McKelvie v Mt Clemens*, 193 Mich App 81, 84; 483 NW2d 442 (1992) (holding that attorney fees were proper under MCR 2.504(A)(2) given that the rule provided the court discretion to dismiss an action "on terms and conditions the court deems proper").

Second, pursuant to MCR 7.215(J)(1), *In re Forfeiture of $10,780* is not binding precedent on this Court because it was issued before November 1, 1990. See

Nalbandian v Progressive Mich Ins Co, 267 Mich App 7, 11 n 3; 703 NW2d 474 (2005).

B. COMPENSATION OF BOARD OF REVIEW MEMBERS

Plaintiffs next argue that the probate court erred by compensating each board of review member in the amount of $500 using an hourly rate of $125. According to plaintiffs, the probate court should have compensated the board members at the standard and customary rate of $50 a day.

Under MCL 280.158, the probate court has the authority and discretion to ascertain and determine the costs and expenses of an appeal ("Such costs and expenses shall be ascertained and determined by the judge of probate . . . ."). Resolution of this issue involves determining whether the probate court made an error of law in compensating the board of review members in the amount of $500 each under MCL 280.158. A court by definition abuses its discretion when it makes an error of law. *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006).

Defendant submitted a bill of costs to the court that included compensation of $50 a day for each board of review member, plus mileage. However, a member of the board of review subsequently wrote a letter advising the probate court that the board members had conferred and determined that the appropriate hourly rate for their services was $125. Because each board member spent a total of four hours preparing for and conducting the board of review meeting, the member requested that each board member be compensated in the amount of $500.

In making its determination regarding the amount of compensation for the board members, the probate court held a hearing and heard the arguments of counsel as

well as a statement from that board member wherein he explained to the court how the board members had arrived at their decision that they should each be compensated in the amount of $500. At the conclusion of the hearing, the probate court stated:

> So in regards to board members, I find that the $50 I'm not going to assess. That's a—that's a rate that would apply perhaps when the commissioner didn't prevail. But there are actual fees determined in the plan developed by the board of review with the four hours discussed. So for each board member I'm going to assess payment to them in the amount of $500.

Compensation for board of review members is included in the broad language "whole costs and expenses" in MCL 280.158. It is one of the costs and expenses of plaintiffs' appeal, and, as already observed, the probate court had the discretion to ascertain and determine those costs and expenses. The board members consisted of a practicing attorney, a certified public accountant (CPA), and a realtor. The hourly rate of $125 was much less than the practicing attorney's claimed hourly rate of $440 for legal work, but higher than the CPA's hourly rate of $85. The realtor was compensated on a commission basis, so there was no way to determine his hourly compensation rate. The attorney board member explained that the members established the $125 hourly rate because it was between his $440 hourly rate and the CPA's $85 hourly rate. Plaintiffs do not dispute that the board members spent about four hours preparing for and hearing the case, and they do not argue that the $125 hourly rate was unreasonable. Under the circumstances, we conclude that the probate court did not abuse its discretion by compensating the board members in the amount of $500 each. Moreover, the probate court's offhand remark that the $50 compensation rate would perhaps

apply if defendant did not prevail does not render the probate court's compensation award an abuse of discretion.

In sum, for the reasons we have articulated, the circuit court properly affirmed both the probate court's award of attorney fees under MCL 280.158 and the probate court's compensation of the board of review members.

Affirmed. A public question being involved, no costs are awarded. *Bay City v Bay Co Treasurer*, 292 Mich App 156, 172; 807 NW2d 892 (2011).

WILDER, P.J., and HOEKSTRA and BORRELLO, JJ., concurred.

PEOPLE v KOON

Docket No. 301443. Submitted February 8, 2012, at Grand Rapids. Decided April 17, 2012, at 9:05 a.m. Reversed, 493 Mich ___.

Rodney Lee Koon was charged in the 86th District Court with operating a motor vehicle with any amount of a schedule 1 controlled substance in his body in violation of MCL 257.625(8). When defendant was stopped for speeding, he informed the police officer that he had a medical marijuana registry card and admitted that he had smoked marijuana five to six hours earlier. A blood test showed that defendant had active tetrahydrocannabinol in his bloodstream when operating the vehicle. The court, Thomas J. Phillips, J., concluded that defendant's registration under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., protected him from prosecution under MCL 257.625(8) unless the prosecution was able to prove that defendant was actually impaired by the presence of marijuana in his body. The Grand Traverse Circuit Court, Philip E. Rodgers, Jr., J., affirmed the ruling, concluding that the MMMA superseded the zero-tolerance provision of MCL 257.625(8). The prosecution appealed by leave granted.

The Court of Appeals *held*:

An initiative law such as the MMMA is analyzed to ascertain and effectuate the intent of the people. It is presumed that the people meant what the statute plainly expresses, and all words are given their ordinary and customary meaning. Even though a registered qualifying patient may possess and use marijuana to treat or alleviate a debilitating medical condition or its symptoms, MCL 333.26424(a) and (e), marijuana is still classified as a schedule 1 controlled substance under MCL 333.7212(1)(c). The circuit court erred by concluding that defendant's registration under the MMMA protected him from being charged with a violation of MCL 257.625(8). The MMMA expressly prohibits a registered individual from operating a motor vehicle while under the influence of marijuana, MCL 333.26427(b)(4). The MMMA does not grant a registered medical-marijuana user the right to internally possess marijuana under any circumstances, that is, have the substance in his or her body. Rather, it provides a

procedure under which ill individuals are able to use marijuana for its palliative effect without fear of arrest and prosecution for that use. The MMMA does not define the term "under the influence of marijuana," but MCL 257.625(8) provides that under the Michigan Vehicle Code, a person is under the influence of marijuana if he or she has any amount of marijuana in his or her body. There was no clear legislative intent in the MMMA to repeal MCL 257.625(8) by implication as applied to marijuana. The definition does not conflict with the MMMA because the MMMA expressly prohibits the operation of a vehicle while under the influence of marijuana, as well as other circumstances under which medical use of marijuana is not permitted. Thus, the MMMA does not provide a protection from prosecution for violating MCL 257.625(8).

Reversed and remanded.

CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — OPERATING A VEHICLE WITH ANY AMOUNT OF A CONTROLLED SUBSTANCE IN THE DRIVER'S BODY.

The Michigan Medical Marihuana Act (MMMA), MCL 333.26421, *et seq*., which permits the medical use of marijuana by certain persons registered under the act, does not provide protection to registered uses from prosecution for a violation of MCL 257.625(8), the provision of the Michigan Vehicle Code that prohibits a person from operating a vehicle with any amount of a schedule 1 controlled substance, such as marijuana, in his or her body.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Alan Schneider*, Prosecuting Attorney, and *Jennifer Tang-Anderson*, Assistant Prosecuting Attorney, for the people.

James Hunt for defendant.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Joel McGormley* and *Linus Banghart-Linn*, Assistant Attorneys General, for the Attorney General.

Larry J. Burdick and *William J. Vailliencourt, Jr.*, for the Prosecuting Attorneys Association of Michigan.

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

SAWYER, P.J. This case presents the question whether the "zero tolerance" provision of MCL 257.625(8), which prohibits operating a motor vehicle with any amount of a schedule 1 controlled substance in the driver's body, still applies if the driver used marijuana under the Michigan Medical Marihuana Act (MMMA).[1] We conclude that it does.

Defendant was pulled over for speeding 83 miles an hour in a 55-mile-an-hour zone. The arresting officer smelled intoxicants, and defendant admitted having consumed one beer sometime within the last couple of hours. Defendant consented to a pat-down of his person, voluntarily removed a pipe, and explained that he had a medical marijuana registry card and had last smoked marijuana five to six hours earlier. A blood test showed that defendant had active tetrahydrocannabinol in his system. Defendant was charged with operating a motor vehicle with a schedule 1 controlled substance in his body[2] under the "zero tolerance" law. The district court concluded that the MMMA protected defendant from prosecution under MCL 257.625(8), unless the prosecution could prove that defendant was actually impaired by the presence of marijuana in his body. The circuit court affirmed and concluded that the MMMA supersedes the zero-tolerance law. The prosecution now appeals by leave granted.

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[1] MCL 333.26421 *et seq*. Although the statute refers to "marihuana," this Court uses the more common spelling "marijuana" in its opinions except in quotations.

[2] MCL 257.625(8).

This question can be resolved by looking to the pertinent statutory provisions and considering the basic rules of statutory construction. Like the interpretation of other statutes, our duty when analyzing an initiative law is to ascertain and effectuate the intent of the people. We presume that the people meant what the statute plainly expresses and give all words their ordinary and customary meaning as the voters would have understood them.[3]

MCL 257.625(8) provides:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214.

Under MCL 333.7212(1)(c), marijuana remains a schedule 1 controlled substance despite the passage of the MMMA.

Turning to the MMMA, MCL 333.26424(a) states in relevant part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana . . . .

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[3] *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010).

MCL 333.26423(e) defines "medical use" of marijuana as

> the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.

The MMMA also recognizes a number of circumstances under which the medical use of marijuana is not permitted. One of those exceptions specifically states that the protections will not apply to operating a motor vehicle while under the influence of marijuana.[4] Thus, while the MMMA permits the medical use of marijuana, it recognizes that marijuana use is inconsistent with engaging in some activities at the same time as the use of the marijuana. This is certainly not an irrational provision. For example, it is not uncommon for a medication, whether prescription or over-the-counter, to be accompanied by a warning not to drive while using the medication. The problem that develops in this case is that, while MCL 333.26423 defines a number of terms used in the MMMA, it does not define the phrase "under the influence of marijuana."

What we are left with is the MMMA, which affords a certain degree of immunity from prosecution for possession or use of marijuana for a medical purpose, and the Michigan Vehicle Code, which prohibits operating a motor vehicle while there is any amount of marijuana in the driver's system. These two provisions are not in conflict. The MMMA or the Legislature could have rescheduled marijuana to one of the other schedules, but they did not. Therefore, marijuana remains a schedule 1 controlled substance. Furthermore, while the

[4] MCL 333.26427(b)(4).

MMMA does not provide a definition of "under the influence of marijuana," MCL 257.625(8) essentially does, establishing that any amount of a schedule 1 controlled substance, including marijuana, sufficiently influences a person's driving ability to the extent that the person should not be permitted to drive.

In order to conclude that the MMMA authorizes the operation of a motor vehicle with some marijuana in the driver's system, we would have to supply a definition of "under the influence of marihuana" in MCL 333.26427(b)(4) that conflicts with the provisions of MCL 257.625(8). To do so, we would have to conclude that the MMMA repealed MCL 257.625(8) by implication as applied to marijuana. But it is well established that repeal by implication is disfavored.[5] To do so, there must be a clear legislative intent to repeal, and there must not be another reasonable construction.[6]

In this case, there is a reasonable construction. The Legislature has determined that it is illegal to operate a motor vehicle with any amount of marijuana in the driver's system. MCL 257.625(8). This does not conflict with the MMMA because not only does the MMMA not extend its protections of the medical use of marijuana to operating a motor vehicle while under the influence of marijuana, it also recognizes other circumstances in which the medical use of marijuana is not permitted by the MMMA. For example, medical use of marijuana is not permitted on a school bus,[7] and the MMMA does not permit smoking marijuana, even for medical use, on public transportation.[8]

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[5] *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 576; 548 NW2d 900 (1996).

[6] *Id.*

[7] MCL 333.26427(b)(2)(A).

[8] MCL 333.26427(b)(3)(A).

Indeed, this points out one of the flaws in the argument that defendant has the right to "internally possess" marijuana while driving. While the MMMA does include the term "internal possession" within its definition of "medical use,"[9] that does not equate with a right to internally possess marijuana under any circumstances. As noted, the MMMA specifically does not permit any medical use of marijuana on a school bus, which presumably includes even internal possession. Similarly, under other circumstances, some, but not all, types of medical use of marijuana are permitted, for example, on public transportation, where one can presumably internally possess it, but not smoke it.

Furthermore, the MMMA does not codify a *right* to use marijuana; instead, it merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law. Although these individuals are still violating the law by using marijuana, the MMMA sets forth particular circumstances under which they will not be arrested or otherwise prosecuted for their lawbreaking.[10] In other words, the act grants immunity from arrest and prosecution, rather than the granting of a right. Thus, contrary to defendant's claim, he does not have a blanket right to internally possess medical marijuana.[11]

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[9] MCL 333.26424(e).

[10] See *People v King*, 291 Mich App 503, 507-509; 804 NW2d 911 (2011), lv gtd 489 Mich 957; see also *Casias v Wal-Mart Stores, Inc*, 764 F Supp 2d 914, 922 (WD Mich, 2011).

[11] Defendant contends that the MMMA grants him the "right" to "internally possess" marijuana and, therefore, as long as he does not break any other laws, he can go about his day-to-day activities, including operating a motor vehicle. Defendant further argues that as long as the marijuana does not affect his ability to operate a motor vehicle, he is immune from prosecution. Like most individuals, defendant miscon-

The point is that the MMMA does not permit all types of medical use of marijuana under all circumstances. Rather, there are circumstances under which some uses are permitted and others under which no use is permitted. If the drafters of the MMMA had wanted to include immunity for the operation of a motor vehicle in MCL 333.26424, the act would have explicitly granted immunity either in MCL 333.26424(a) or in MCL 333.26423(e). It does not. Indeed, MCL 333.26427(b)(4) explicitly prohibits the operation of a motor vehicle while under the influence of marijuana. And in the Michigan Vehicle Code, MCL 257.625(8), the Legislature has provided a definition of what constitutes being under the influence of marijuana: the presence of any amount of marijuana in the person's body, that is to say, while "internally possessing" it.

The MMMA does not provide a protection from prosecution for violating MCL 257.625(8). Driving is a particularly dangerous activity; schedule 1 substances are considered particularly inimical to a driver's ability to remain in maximally safe control of the vehicles, and the danger of failing to do so affects not only the driver, but anyone else in the vicinity.

For these reasons, defendant was properly charged with a violation of MCL 257.625(8), and CJI2d 15.3a

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strues the MMMA. The MMMA does not codify a *right* to use marijuana, nor does it grant any citizen the "right" to use or possess marijuana. While this may seem strange to anyone who has encountered the act, it is the process set up by what many have referred to as an inartfully drafted act. What the MMMA did is set up a process by which certain individuals cannot be arrested or prosecuted for their lawbreaking. These protections, or immunities from lawbreaking, are very limited in scope. In essence, defendant is asking this Court to extend these protections to other activities, such as operating a motor vehicle, a boat, or an airplane. We respectfully decline; it is the Legislature's job to expand the law, not the Court's responsibility.

(operating a vehicle with any amount of a schedule 1 or 2 controlled substance in driver's body) may be given at any trial in this case.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL and RONAYNE KRAUSE, JJ., concurred with SAWYER, P.J.

SIETSEMA FARMS FEEDS, LLC v DEPARTMENT OF TREASURY

Docket No. 302033. Submitted February 14, 2012, at Lansing. Decided February 28, 2012. Approved for publication April 17, 2012, at 9:10 a.m.

Sietsema Farms Feeds, L.L.C., which operates a feed mill in which corn and other grains are dried, ground, and mixed with additives to produce animal feed that is sold to farms, petitioned in the Tax Tribunal with regard to an assessment by the Department of Treasury of use tax and interest following the department's rejection of petitioner's claim that certain equipment purchased by petitioner for use at its feed mill was exempt from the use tax under the agricultural-production exemption of the Use Tax Act, MCL 205.94(1)(f). The disputed equipment was used only at the feed mill and only to make feed to sell to other entities. The equipment was not used at the feed mill to feed livestock or poultry and petitioner did not go to farmers' properties and use the disputed equipment to feed their livestock or poultry. The Tax Tribunal agreed with respondent that petitioner did not use and consume the property in the "breeding, raising, or caring for livestock, poultry, or horticultural products" as required by the plain language of the agricultural-production exemption, but merely sold its feed to other entities that actually engaged in the qualifying activity. The Tax Tribunal ruled that petitioner's selling of feed to entities that were engaged in the qualifying activities did not vicariously extend the exemption to petitioner. After the Tax Tribunal sua sponte raised the issue whether petitioner was entitled to the industrial-processing exemption of the Use Tax Act, MCL 205.94*o*, and considered additional information submitted by the parties, the Tax Tribunal granted summary disposition in favor of respondent, concluding that petitioner was not entitled to either exemption. The Tax Tribunal then denied petitioner's motion for reconsideration. Petitioner appealed.

The Court of Appeals *held*:

1. The relevant language of MCL 205.94(1)(f) provides that petitioner must be a business enterprise and must be using and consuming the disputed property to feed livestock and poultry. The disputed property was used only at the feed mill and only to make

feed to sell to other entities. Petitioner did not use the disputed property to feed livestock and poultry. The Tax Tribunal properly held that petitioner was not entitled to the agricultural-production exemption.

2. Petitioner failed to offer on appeal any persuasive argument that the Tax Tribunal's decision denying an industrial-processing exemption under MCL 205.94*o* constituted an error of law or was unsupported by competent, material, and substantial evidence on the whole record. The Tax Tribunal's decision that petitioner was not entitled to the industrial-processing exemption is affirmed.

Affirmed.

TAXATION — USE TAX — AGRICULTURAL-PRODUCTION EXEMPTION.

Property sold to a person engaged in a business enterprise that then uses and consumes the property in the breeding, raising, or caring for livestock, poultry, or horticultural products is entitled to the agricultural-production exemption from use tax provided in the Use Tax Act; a person must be both engaged in a business enterprise and use and consume the property in the breeding, raising, or caring for livestock, poultry, or horticultural products to be entitled to the exemption (MCL 205.94[1][f]).

The Novis Law Firm, PLLC (by *James H. Novis*), for petitioner.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Michael R. Bell*, Assistant Attorney General, for respondent.

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM. Petitioner, Sietsema Farms Feeds, L.L.C., appeals as of right the Michigan Tax Tribunal's order granting summary disposition in favor of respondent, Michigan Department of Treasury, rejecting petitioner's claim that certain purchased property was exempt from the use tax and affirming respondent's assessment. We affirm.

Petitioner operates a feed mill in which corn and other grains are dried, ground, and mixed with additives to produce animal feed that is sold to hog and turkey farms owned in part or in whole by the Sietsema family and entities affiliated with petitioner. Following a use tax audit, respondent determined that certain equipment purchased by petitioner for use at the feed mill was not exempt under the agricultural-production exemption. The equipment included truck scales, storage/processing tanks, storage tank inventory-monitoring equipment, a liquid-storage tank, and a personnel elevator.

After petitioner was issued a notice of intent to assess, petitioner sought an informal conference, following which an assessment of $19,965.11, plus interest, was upheld. Petitioner then appealed the final assessment in the Michigan Tax Tribunal. After the submission of a joint stipulation of facts, cross-motions for summary disposition pursuant to MCR 2.116(C)(10) were filed. Petitioner argued that it was entitled to the agricultural-production exemption provided in the Michigan Use Tax Act, MCL 205.94(1)(f), because the two requirements of the statute were met: (1) it was a business enterprise and (2) the property was used or consumed in agricultural production because it processed feed for hogs and turkeys. Respondent argued, however, that petitioner did not use the equipment in an agricultural-production activity. That is, petitioner did not use and consume the property in the "breeding, raising, or caring for livestock, poultry, or horticultural products," as required by the plain language of the agricultural-production exemption. Petitioner merely sold its feed to other entities actually engaged in the qualifying activity.

The Tax Tribunal agreed with respondent, holding that, although petitioner was engaged in a business enter-

prise, petitioner was not "using and consuming the property . . . in the breeding, raising, or caring for livestock, poultry, or horticultural products . . . ." MCL 205.94(1)(f). Petitioner's selling of feed to entities that were engaged in the qualifying activities did not "vicariously" extend the exemption to petitioner. Simply stated, petitioner did not use the disputed property to feed animals. The Tax Tribunal noted that, according to petitioner's argument, manufacturers of pharmaceuticals for farm animals or providers of veterinary services would also be entitled to the agricultural-production exemption simply because they engage in activities that support agriculture. At oral argument on the cross-motions, although not argued by petitioner, the Tax Tribunal raised the issue whether petitioner was entitled to the industrial-processing exemption, MCL 205.94*o*, and requested further information. After review of the additional information submitted by the parties, the Tax Tribunal held that petitioner failed to establish entitlement to the industrial-processing exemption. Accordingly, the Tax Tribunal concluded that petitioner was not entitled to either the agricultural-production or industrial-processing exemptions; thus, the assessment was affirmed and respondent's motion for summary disposition was granted. After petitioner's motion for reconsideration was denied, this appeal followed.

Petitioner first argues that the Tax Tribunal erroneously concluded that it did not qualify for the agricultural-production exemption, MCL 205.94(1)(f), because both statutory criteria were met—it was engaged in a business enterprise and the contested property was used and consumed in raising or caring for (feeding) livestock or poultry. We disagree.

The Tax Tribunal's determination of a motion for summary disposition is reviewed de novo. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141;

783 NW2d 133 (2010). "In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011) (quotation marks and citation omitted).

Generally, the Michigan Use Tax Act, MCL 205.91 *et seq*., imposes a tax "for the privilege of using, storing, or consuming tangible personal property . . . ." MCL 205.93(1). However, the act sets forth exemptions to the use tax. In general, tax exemptions are strictly construed in favor of the taxing authority. *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 31; 558 NW2d 444 (1996). But ambiguities are to be resolved in favor of the taxpayer. *Czars, Inc v Dep't of Treasury*, 233 Mich App 632, 637; 593 NW2d 209 (1999).

At issue here is the agricultural-production exemption, MCL 205.94(1)(f), which exempts from use tax "[p]roperty sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products . . . ." MCL 205.94(1)(f).

The primary goal of statutory interpretation is to determine the intent of the Legislature as discerned from the statutory language and give effect to that intent. *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 665-666; 649 NW2d 760 (2002). Where a statute is clear and unambiguous, judicial construction is neither appropriate nor permitted, and the statutory language must be read according to its ordinary mean-

ing. *Id*. at 666. Nothing may be read into a clear statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Paris Meadows*, 287 Mich App at 141 (quotation marks and citation omitted). And, in construing a statute, the court should presume that every word has some meaning, avoiding a construction that would render any part of a statute surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Here, the parties stipulated that petitioner was engaged in a business enterprise. However, as denoted by the conjunctive term "and" between the two statutory conditions, petitioner must also have been "using and consuming the property . . . in the breeding, raising, or caring for livestock, poultry, or horticultural products . . . ." Petitioner argues that this second requirement was met because the property was "used to produce livestock and poultry feed, a necessary part of raising the swine and turkeys that eat the feed." But petitioner's interpretation fails to account for important statutory terms; in particular, that petitioner be engaged in a business enterprise "*and* using and consuming the property . . . in the breeding, raising, or caring for" livestock and poultry. (Emphasis supplied). So, here, petitioner must be using and consuming the disputed property to feed livestock and poultry.

Petitioner supports its claim by citing the case of *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570; 473 NW2d 783 (1991). In that case, the petitioner was assessed a use tax on fertilizer equipment that it claimed was involved in agricultural production. *Id*. at 571. This Court noted that, in the petitioner's business, it purchased and used fertilizer-application equipment "for a contractual service to

farmers for the application of fertilizer . . . ." *Id*. At issue in that case was the provision of MCL 205.94(1)(f) that provides that the exemption is applicable to "[p]roperty sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil . . . ." *Id*. at 572. This Court held that the petitioner qualified for the exemption because it was undisputed that the "petitioner is a business enterprise and that the fertilizing equipment is used in the tilling, planting, caring for, or harvesting of things of the soil." *Id*. at 573. The petitioner used the disputed property to apply fertilizer to farmland. This Court rejected the respondent's argument that the taxpayer had to be "in the business of producing agricultural products in order for [MCL 205.94(1)(f)] to apply," and concluded that the exemption "does not require that the taxpayer be engaged in the actual production of horticultural or agricultural products." *Id*. at 573-574.

The facts in our case, however, are distinguishable from those in *Mueller*. Here, the disputed equipment was used only at the feed mill and only to make feed to sell to other entities. Petitioner did not use the disputed property to feed livestock and poultry. And petitioner was not going to farmers' properties and using the property to feed their livestock and poultry. Petitioner was engaged in a business enterprise, but petitioner was not "*using and consuming* the property . . . in the breeding, raising, or caring for livestock, poultry, or horticultural products . . . ." MCL 205.94(1)(f) (emphasis supplied). In *Mueller*, the petitioner was using the disputed equipment to provide fertilizing services to farmers. That is, the petitioner was engaged in a business enterprise *and* the petitioner was "using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil," although it

was not the petitioner's soil and the resulting products were not the petitioner's products. Thus, here, the holding in *Mueller* would apply to support petitioner's exemption claim only if petitioner was using and consuming the property to actually feed livestock and poultry—even if not petitioner's animals—which petitioner did not do.

Petitioner also supports its argument by citing the case of *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486; 618 NW2d 917 (2000). In that case, the petitioner marketed milk for dairy farmers and was assessed a use tax for machinery, equipment, and supplies it used to test raw milk. *Id*. at 487-488. It was undisputed that "milk production" was within the scope of the agricultural-production exemption. *Id*. at 493. The issue, however, was whether the testing equipment was used by petitioner for producing the milk (and thus eligible for the exemption) or for marketing the milk (and thus not eligible for the exemption). *Id*. at 494. This Court noted that the law required that milk be tested before it could be sold commercially and that the petitioner's testing "establishes the identity and confirms the safety of the raw milk produced on the farm." *Id*. Thus, this Court concluded, the petitioner's use of its equipment to test milk before it could be marketed was part of the process of producing milk and that equipment was exempt from the use tax. *Id*. at 495. The respondent's argument that the petitioner had to be an agricultural producer, i.e., a milk producer, was rejected. *Id*. The petitioner was using the disputed property to produce milk, even though it was not the petitioner's milk.

The facts in our case, however, are also distinguishable from those of *Mich Milk Producers*. Here, petitioner's equipment was used by petitioner to make feed to

sell to other entities. There is no contention that feed production is equated with "agricultural production," but that fact is not dispositive because this Court has held that a business entity need not actually be an agricultural producer. Petitioner contends that "the mixing of grain to be fed to farm animals [is] a direct part (necessary component) of the raising, or caring for livestock, poultry, or horticultural products." But petitioner was not using the disputed property to actually feed the animals. That is, petitioner was not "*using and consuming* the property . . . in the breeding, raising, or caring for livestock, poultry, or horticultural products . . . ." MCL 205.94(1)(f) (emphasis supplied). The petitioner in *Mich Milk Producers* was "using and consuming" the property to test milk during the production process, although in the provision of services to another entity. Thus, the holding in *Mich Milk Producers* would apply to support petitioner's exemption claim only if petitioner was using and consuming the equipment to actually feed livestock and poultry—even if not petitioner's animals—which petitioner did not do.

Accordingly, we conclude that the Tax Tribunal properly interpreted the plain language of MCL 205.94(1)(f) and held that petitioner was not entitled to the agricultural-production exemption. Petitioner was not using and consuming the truck scales, storage/processing tanks, storage tank inventory-monitoring equipment, liquid-storage tank, and personnel elevator to feed livestock and poultry. Thus, the Tax Tribunal's decision to grant respondent's motion for summary disposition in this regard is affirmed.

Next, petitioner appears to argue that the Tax Tribunal erroneously concluded that it did not qualify for the industrial-processing exemption, MCL 205.94*o*. However, in its brief on appeal petitioner provides very little detail

or argument with regard to this issue, only briefly claiming that the issue was not properly adjudicated because petitioner was not given an effective opportunity to address it. Then petitioner continues its argument related to the agricultural-production exemption.

But petitioner only averred in its petition that the disputed property was exempt under the agricultural-processing exemption and did not assert an alternative claim that the property was also exempt under the industrial-processing exemption. Petitioner's motion for summary disposition also did not address the issue whether its property was exempt under the industrial-processing exemption. The Tax Tribunal initiated the discussion at the motion hearing regarding whether some of the property may qualify for the industrial-processing exemption and requested additional information in that regard, which petitioner provided. Thereafter, the Tax Tribunal determined that the disputed property did not qualify for the industrial-processing exemption. And petitioner did not challenge that decision in its motion for reconsideration. Accordingly, petitioner had the opportunity to address and argue this issue that was raised sua sponte by the Tax Tribunal. And on appeal petitioner has failed to offer any persuasive argument that the Tax Tribunal's decision denying an industrial-processing exemption constituted an error of law or was unsupported by competent, material, and substantial evidence on the whole record. Thus, we also affirm the Tax Tribunal's decision that petitioner was not entitled to the industrial-processing exemption with regard to the disputed property.

Affirmed.

HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ., concurred.

CORWIN v DAIMLERCHRYSLER INSURANCE COMPANY

Docket No. 301931. Submitted March 16, 2012, at Detroit. Decided April 17, 2012, at 9:15 a.m.

John M. and Vera-Anne V. Corwin were injured in an automobile accident that occurred when the Jeep Compass they were in, which John leased from Chrysler LLC and insured through Daimler-Chrysler Insurance Company (Chrysler Insurance), was hit by a vehicle driven by Leslie Ann Jackson, an uninsured motorist. At the time of the accident, the Corwins also owned a Jeep Liberty that was insured by Auto Club Insurance Association under a no-fault policy that named John and Vera-Anne as named insureds. The Corwins also owned a motor home that was insured by Foremost Insurance Company under a no-fault policy that named John as the named insured. The insurance policy for the Jeep Compass named Chrysler LLC and its United States subsidiaries, rather than the Corwins, as the named insureds and it stated that Chrysler Insurance was not responsible for personal injury protection (PIP) benefits if the Corwins are entitled to PIP benefits as the named insured in another policy. After the accident, Auto Club provided PIP benefits to the Corwins. The Corwins and Auto Club brought an action in the Oakland Circuit Court against Chrysler Insurance, Chrysler LLC, Foremost, and Jackson, seeking a declaratory judgment regarding the insurers' obligations to pay PIP benefits, Auto Club's right to reimbursement, and the Corwins' right to uninsured-motorist coverage under the three insurance policies. The Corwins and Auto Club also pleaded a single count of negligence against Jackson. Chrysler Insurance and Chrysler LLC filed a counterclaim against the Corwins and Auto Club and moved for summary disposition, arguing that Auto Club and Foremost had coequal priority to pay the Corwins' PIP benefits because John was a named insured on both the Auto Club and the Foremost policies, but not on the Chrysler Insurance Policy. Chrysler Insurance also argued that the Corwins could not recover uninsured-motorist benefits from it because its policy did not provide such coverage. Auto Club and Foremost also moved for summary disposition, arguing that all three insurers shared liability for the Corwins' PIP benefits because the Corwins were the named insureds on the Auto Club and Foremost policies and the

Chrysler Insurance policy should be reformed by the court to name the Corwins as the named insureds because it improperly shifted Chrysler Insurance's statutory responsibility for the Corwins' PIP benefits to Auto Club and Foremost. The court, Martha D. Anderson, J., granted Chrysler Insurance's motion and denied the motion by Auto Club and Foremost in an opinion and order. The court held that Auto Club and Foremost were coequals in the highest order of priority to pay the Corwins' PIP benefits and that the Chrysler Insurance policy did not provide uninsured-motorist coverage for the Corwins. The court granted in part Auto Club's motion for reconsideration in order to amend its prior opinion and order to reflect that Auto Club's motion for summary disposition was granted in part to the extent that Auto Club and Foremost were coequals in the highest order of priority. Before a final order of judgment was entered, Auto Club and Foremost reached a settlement, agreeing that they were in the same order of priority and that Foremost would pay Auto Club $313,655.73 in settlement of the past and present PIP benefits that Auto Club had paid the Corwins. The court then entered an order of judgment, a partial consent judgment, in favor of Auto Club and against Foremost for $313,655.73 and dismissed with prejudice the Corwins' claims for uninsured-motorist benefits. The judgment noted that the Corwins, Auto Club, and Foremost preserved their continued objections to the summary disposition rulings and their right to appeal the issue regarding Chrysler Insurance's liability for PIP benefits. Auto Club appealed and Foremost cross-appealed.

The Court of Appeals *held*:

1. The Chrysler Insurance policy is invalid under the no-fault act and requires reformation because Chrysler LLC and its United States subsidiaries, the named insureds in the policy, do not have an insurable interest and the policy contravenes the legislative intent of the no-fault act by shifting primary liability for no-fault coverage. The policy must be reformed so that there is an insurable interest belonging to a named insured compatible with public policy.

2. The owner or registrant of a motor vehicle must provide residual liability insurance under the no-fault act. Under the no-fault act, John Corwin is the owner of the Jeep Compass because he leased it for more than 30 days, MCL 500.3101(2)(h)(*i*). John purchased no-fault insurance for the Jeep Compass through Chrysler Insurance and, thus, Chrysler Insurance provided no-fault insurance to the Corwin household and was the Corwins' personal insurer. Chrysler Insurance may not avoid the legislative intent that an injured person's personal insurer stand primarily

liable for PIP benefits. The Chrysler Insurance policy must be reformed so that Chrysler Insurance is primarily liable (along with Auto Club and Foremost) for PIP benefits in accordance with MCL 500.3114(1).

3. The Chrysler defendants stated that at the time of the collision the Corwins had a policy of insurance issued by Chrysler Insurance. The Chrysler Insurance policy must be reformed to include both John and Vera-Anne as named insureds who fall within the policy's definition of "you."

4. The liability of the three insurers for the Corwins' PIP benefits is governed by MCL 500.3114(1), which provides, in part, that a personal protection insurance policy applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. The statute further provides that when personal protection insurance benefits are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all the benefits and is not entitled to recoupment from the other insurer. Auto Club, Foremost, and Chrysler Insurance are of equal priority for John's PIP benefits because John is a named insured on their policies. Because Vera-Anne is a named insured on only the Auto Club and Chrysler Insurance policies, Auto Club and Chrysler Insurance are primarily liable for her PIP benefits. PIP benefits are payable to Vera-Anne under her own Auto Club and Chrysler Insurance policies, and, although benefits would also be payable to her under her spouse's policy with Foremost, her insurers, Auto Club and Chrysler Insurance must pay all her PIP benefits pursuant to MCL 500.3114(1). The matter is remanded to the trial court to determine the amount of each insurer's liability and to order the appropriate reimbursement pursuant to MCL 500.3115(2).

Reversed and remanded.

1. INSURANCE — NO-FAULT — WORDS AND PHRASES — OWNER.

The owner or registrant of a motor vehicle required to be registered in Michigan must maintain security for the payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance; an "owner" includes a person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days (MCL 500.3101[1] and [2][h]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE.

A personal protection insurance policy described in MCL 500.3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident; "the person named in the policy" is synonymous with the term "the named insured"; when personal protection insurance benefits are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer must pay all of the benefits and is not entitled to recoupment from the other insurer (MCL 500.3114[1]).

3. INSURANCE — NO-FAULT — PERSONAL INJURY PROTECTION BENEFITS.

Personal injury protection coverage protects the person, not the motor vehicle; a person who sustains accidental bodily injury while an occupant of a motor vehicle must first look to no-fault insurance policies within the person's household for no-fault personal injury protection benefits; a no-fault insurance carrier can be responsible for personal injury protection benefits even if the motor vehicle it insures was not the actual motor vehicle involved in the accident (MCL 500.3101[1]; MCL 500.3114[1]).

4. INSURANCE — NO-FAULT — PERSONAL INJURY PROTECTION BENEFITS — INSURERS IN SAME ORDER OF PRIORITY.

When two or more insurers are in the same order of priority to provide personal injury protection benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority (MCL 500.3115[2]).

5. INSURANCE — NO-FAULT — REFORMATION OF POLICIES.

Reformation of an insurance policy is an equitable remedy; when reasonably possible, courts are obligated to construe insurance contracts that conflict with the no-fault act, and therefore violate public policy, in a manner that renders them compatible with public policy as reflected in the act.

6. INSURANCE — NO-FAULT — INSURABLE INTERESTS.

An insured must have an insurable interest to support the existence of a valid motor vehicle liability insurance policy; the insurable interest must be that of a named insured; the insurable interest need not be in the nature of ownership and an individual can have an insurable interest without having title to the vehicle; an insurable interest can be any kind of benefit from the thing so

insured or any kind of loss that would be suffered by its damage or destruction; a person has an insurable interest in his or her own health and well-being and such interest entitles an insured person to personal protection benefits under the no-fault act regardless of whether a covered vehicle is involved.

7. INSURANCE — NO-FAULT — PUBLIC POLICY — MOTOR VEHICLES — INSURABLE INTERESTS.

Michigan's public policy forbids the issuance of an insurance policy where the insured lacks an insurable interest; owners and registrants have an insurable interest in their motor vehicles because the no-fault act requires them to carry no-fault insurance and makes it a misdemeanor to fail to do so; the insurable interest of owners and registrants is, therefore, contingent upon personal pecuniary damage created by the no-fault act (MCL 500.3102[2]).

8. INSURANCE — NO-FAULT — LESSEES — INSURABLE INTERESTS — WORDS AND PHRASES — OWNER — REGISTRANT.

A person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days is neither the owner nor registrant of the vehicle and does not have an insurable interest in the vehicle contingent upon personal pecuniary damage created by the no-fault act (MCL 500.3101[2][h][*ii*] and [i]).

Hom, Killeen, Siefer, Arene & Hoehn (by *Elaine I. Harding*) and *John A. Lydick* for Auto Club Insurance Association.

Law Offices of Thomas R. Bieglecki P.C. (by *Thomas R. Bieglecki*) for DaimlerChrysler Insurance Company.

Cory & Associates (by *Patrick W. Bennett*) for Foremost Insurance Company.

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM. This appeal involves a priority dispute among three automobile insurance companies. In 2007, plaintiffs John and Vera-Anne Corwin sustained severe

injuries in a car accident while driving a 2007 Jeep Compass that John leased from defendant Chrysler LLC[1] and insured through defendant DaimlerChrysler Insurance Company[2] (Chrysler Insurance). The Corwins also owned two other motor vehicles: one insured by plaintiff Auto Club Insurance Association (Auto Club) and the other by defendant Foremost Insurance Company (Foremost). Auto Club and Foremost have paid the Corwins' personal injury protection (PIP) benefits at the time of this appeal. Chrysler Insurance insists that it does not share this responsibility because Chrysler LLC and its United States subsidiaries, rather than the Corwins, are the named insureds in the insurance policy for the Jeep Compass, and the policy states that Chrysler Insurance is not responsible for PIP benefits if the Corwins are entitled to PIP benefits as the named insureds in another policy. The trial court agreed and granted summary disposition in Chrysler Insurance's favor.

Michigan law requires that the named insured in an automobile insurance policy have an insurable interest. Moreover, a motor-vehicle insurer cannot avoid or shift its statutory primary responsibility for PIP benefits. We conclude that Chrysler LLC and its United States subsidiaries do not have an insurable interest as required by Michigan law and that the Chrysler Insurance policy contravenes the no-fault act by enabling Chrysler Insurance to avoid and shift its statutory responsibility for its share of the Corwins' PIP benefits. Thus, we reform the Chrysler Insurance policy to comply with Michigan law by including both John and

[1] Chrysler LLC was known as DaimlerChrysler Corporation at the time.

[2] DaimlerChrysler Insurance Company recently changed its name to CorePoint Insurance Company.

Vera-Anne as "named insureds" falling within the policy's definition of "you." We reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

John and Vera-Anne Corwin are husband and wife and live together in Oakland County. John is a retiree of Chrysler LLC. As a retiree, John qualified for a Chrysler vehicle lease program. Through the program, John leased a 2007 Jeep Compass from Chrysler LLC beginning in June 2007. The term of the lease was for two years. Chrysler Insurance insured the Jeep Compass under a fronted insurance policy.[3] Chrysler LLC never gave John an option of purchasing insurance with another automobile insurer. When John received the Jeep Compass, he received a certificate of insurance; however, John was not the named insured on the certificate. John never received a copy of the insurance policy or a title for the vehicle. However, John did receive a "lease vehicle terms and conditions manual." John had a monthly lease fee of about $300 that was deducted from his pension check. The terms and conditions manual provided that the monthly fee "covered all expenses related to the [Jeep Compass] including insurance" that was "required by the state." John was never informed what portion of his monthly payment was for the insurance.

The Chrysler Insurance policy declarations page and endorsements IL-A and IL-B provide that Daimler-

[3] Fronting is "[t]he use of an insurer to issue paper—that is, an insurance policy—on behalf of a self-insured organization . . . without the intention of bearing any of the risk. The risk of loss is transferred back to the self-insured . . . with an indemnity or reinsurance agreement." Int'l Risk Mgt Institute, Inc, Glossary of Insurance & Risk Management Terms <http://www.irmi.com/online/insurance-glossary/terms/f/fronting.aspx> (accessed March 19, 2012).

Chrysler Corporation and its United States subsidiaries are the "named insured" for the Jeep Compass. The policy defines "you" as "the Named Insured shown in the Declarations" and "us" as "the Company providing this Insurance." The Chrysler Insurance policy states the following with respect to coverage: "We will pay personal injury protection [PIP] benefits to or for an 'insured' who sustains 'bodily injury' caused by an 'accident' and resulting from the ownership, maintenance or use of an 'auto' as an 'auto'." The policy defines an "insured" as follows:

> **B. Who Is An Insured**
>
> 1. You or any "family member".
>
> 2. Anyone else who sustains "bodily injury":
>
> a. While "occupying" a covered "auto", or
>
> b. As the result of an "accident" involving any other "auto" operated by you or a "family member" if that "auto" is a covered "auto" under the policy's Liability Coverage, or
>
> c. While not "occupying" any "auto" as a result of an "accident" involving a covered "auto".
>
> The policy contains the following exclusion:
>
> **C. Exclusions**
>
> We will not pay personal injury protection benefits for "bodily injury":
>
> * * *
>
> **6.** To anyone entitled to Michigan no-fault benefits as a Named Insured under another policy. This exclusion does not apply to you or anyone "occupying" a motorcycle.

On August 5, 2007, John was driving the Jeep Compass. Vera-Anne and the Corwins' daughter, Gail, were seated in passenger seats. As John drove through an intersection on a green light, a vehicle driven by defendant Leslie Ann Jackson drove through on a red

light and struck the Jeep Compass "almost completely in the driver's door." Jackson was an uninsured motorist at the time of the accident. Both John and Vera-Anne sustained severe injuries.

At the time of the accident, the Corwins owned a Jeep Liberty that was insured with Auto Club under a Michigan no-fault insurance policy. John and Vera-Anne were the "named insureds" under the policy. The Corwins also owned a motor home. The motor home was insured by Foremost. John was the "named insured" under the policy. After the accident, Auto Club provided the Corwins "hundreds of thousands of dollars" in PIP benefits. But, neither Foremost nor Chrysler Insurance paid the Corwins PIP benefits before this action was initiated.

The Corwins and Auto Club sued Chrysler Insurance, Chrysler LLC, Foremost, and Jackson. The Corwins and Auto Club requested a declaratory judgment regarding the parties' obligations to pay PIP benefits, Auto Club's right to reimbursement from defendants, and the Corwins' right to uninsured-motorist coverage under their three insurance policies. The Corwins and Auto Club also pleaded a single count of negligence against Jackson. Chrysler Insurance and Chrysler LLC filed a counterclaim against the Corwins and Auto Club and moved for summary disposition under MCR 2.116(C)(10). It argued that Auto Club and Foremost had coequal priority to pay the Corwins' PIP benefits because John was a named insured on both the Auto Club and Foremost policies but not the Chrysler Insurance policy. Chrysler Insurance also argued that the Corwins could not recover uninsured-motorist benefits from Chrysler Insurance because the Chrysler Insurance policy did not provide uninsured-motorist coverage at the time of the accident. Auto Club and Foremost

moved for partial summary disposition under MCR 2.116(C)(10). They argued that Chrysler Insurance, Auto Club, and Foremost shared the liability for the Corwins' PIP benefits because (1) the Corwins were the named insureds on the Auto Club and Foremost policies and (2) the Chrysler Insurance policy should be reformed by the court to name the Corwins as the named insureds because the policy improperly shifted Chrysler Insurance's statutory responsibility for the Corwins' PIP benefits to Foremost and Auto Club.

Without hearing oral argument on the parties' motions for summary disposition, the trial court issued an opinion and order on July 1, 2010. The trial court granted Chrysler Insurance's motion for summary disposition and denied Auto Club's and Foremost's motion for summary disposition. The court opined as follows, in pertinent part:

> ACIA [Auto Club Insurance Corporation] and Foremost find themselves in a legal quandary in that the fundamental reality is that DCIC [sic] is the "named insured" on its own policy. This Court believes the law does not permit the interpretation of the No-Fault Act proposed by ACIA and Foremost. The DCIC policy is a "fronting policy" which ACIA and Foremost ask this Court to declare illegal . . . . This Court is asked to "close the loophole" created by the DCIC policy; this is something that this Court cannot do. Absent a directive from a higher authority, this Court cannot find the DCIC policy is illegal or should be interpreted a different way. This Court cannot engage in legislative functions as the proper role of the judiciary is to interpret and not write the law. *State Farm* [*Fire*] *and Cas Co v. Old Republic Ins. Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).
>
> As discussed *supra*, the Corwins were not the "named insured" on [the] DCIC policy, but they were the "named insured" on the ACIA and Foremost policies. MCL 500.3114 specifically refers to the person named in the

> policy. It has been held that "the person named in the policy" as used in the No Fault Act, is synonymous with the term "named insured." *Cvengros v. Farm Bureau Ins*, 216 Mich App 261, 264; 548 NW2d 698 (1996). Based on the principles of statutory interpretation discussed *supra*, this Court finds that ACIA and Foremost are co-equals in the highest order of priority.
>
> . . . As it relates to the Uninsured/Underinsured Motorist Benefits claims relative to the Corwins, this Court finds there is no genuine issue of fact that the DCIC policy provided no such coverage under the policy for Michigan vehicles at the time of the accident.

Auto Club moved for reconsideration. The court granted the motion in part "to correct a clerical error," i.e., to amend its July 1, 2010, opinion and order to reflect that Auto Club's motion for summary disposition was granted in part to the extent that Auto Club and Foremost were coequals in the highest order of priority.

The trial court entered an order of judgment (a partial consent judgment, because, by that time, Auto Club and Foremost had reached a settlement that they were in the same order of priority for purposes of the Corwins' PIP benefits and Foremost had paid Auto Club $313,655.73 in settlement of the past and present PIP benefits Auto Club had paid the Corwins) on December 16, 2010, in favor of Auto Club against Foremost for $313,655.73. It dismissed with prejudice the Corwins' claims for uninsured-motorist benefits. And, it noted that the Corwins, Auto Club, and Foremost preserved "their continued objection" to the court's summary-disposition rulings and their right to appeal the issue of Chrysler Insurance's liability for PIP benefits.[4]

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[4] In a footnote, the court stated that "[a]ny claim by Plaintiffs against Defendant Chrysler LLC has been resolved by Bankruptcy Court pro-

II. ANALYSIS

Auto Club and Foremost argue that the trial court erroneously granted summary disposition in favor of Chrysler Insurance. They contend that the Chrysler Insurance policy violates public policy and, thus, should be reformed. We agree.

A. STANDARD OF REVIEW

We review a trial court's summary-disposition ruling de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

Issues of statutory construction are questions of law, which we review de novo. *Megee v Carmine*, 290 Mich App 551, 559; 802 NW2d 669 (2010). "The interpretation and construction of insurance contracts are also questions of law, which this Court reviews de novo." *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 72; 755 NW2d 563 (2008). Finally, we review "de novo a trial court's decision whether to grant equitable relief." *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997).

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ceedings, and there is no claim by Plaintiffs against Defendant Leslie Ann Jackson because [Jackson] was never served with Plaintiffs' Complaint."

B. CHRYSLER INSURANCE'S PRIORITY WHEN CHRYSLER LLC AND ITS UNITED STATES SUBSIDIARIES ARE THE NAMED INSUREDS

"The Michigan no-fault act, MCL 500.3101 *et seq.*, requires Michigan drivers to maintain automobile insurance." *American Home Assurance Co v Mich Catastrophic Claims Ass'n*, 288 Mich App 706, 717; 795 NW2d 172 (2010). MCL 500.3101(1) provides that the "owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance."

Under the no-fault act, an "owner" means any of the following:

> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.
>
> (*iii*) A person who has the immediate right of possession of a motor vehicle under an installment sale contract. [MCL 500.3101(2)(h).]

"An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the [no-fault] act." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 530; 740 NW2d 503 (2007), citing MCL 500.3105(1).

When determining the priority of insurers liable for no-fault PIP benefits, courts must examine MCL 500.3114. See *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 30; 800 NW2d 93 (2010). MCL 500.3114(1) provides that "a personal protection insur-

ance policy described in [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." The phrase "the person named in the policy" is synonymous with the term "the named insured." *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 264; 548 NW2d 698 (1996) (quotation marks and citation omitted). Moreover, MCL 500.3114(1) states the following:

> When personal protection insurance benefits . . . are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.

"These provisions have been interpreted as providing that no-fault insurance policies for the injured person's household are first in order of priority of responsibility for payment of no-fault benefits . . . ." *Dobbelaere*, 275 Mich App at 530. Therefore, "a person who sustains accidental bodily injury while the occupant of a motor vehicle must first look to no-fault insurance policies within his or her household for no-fault PIP benefits." *Id.* A no-fault insurance carrier can be responsible for PIP benefits even if the motor vehicle it insures was not the actual motor vehicle involved in the accident. See *Detroit Auto Inter-Ins Exch v Home Ins Co*, 428 Mich 43, 48-49; 405 NW2d 85 (1987). "PIP coverage protects the person, not the motor vehicle." *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 17; 684 NW2d 391 (2004) (quotation marks and citation omitted). When two or more insurers are in the same order of priority to provide PIP benefits, "an insurer paying benefits due is entitled to partial recoupment from the

other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers." MCL 500.3115(2).

In this case, the parties correctly agree that, absent reformation of the Chrysler Insurance policy, Chrysler Insurance is not primarily liable for the Corwins' PIP benefits under MCL 500.3114(1). This is because both John and Vera-Anne are a named insured on a no-fault policy in their household, John on the Auto Club and Foremost policies and Vera-Anne on the Auto Club policy, and neither John nor Vera-Anne is a named insured on the Chrysler Insurance policy. Moreover, an exclusion in the Chrysler Insurance policy provides that Chrysler Insurance does not have to pay the Corwins' PIP benefits when the Corwins are "entitled to Michigan no-fault benefits as a Named Insured under another policy."

The critical issues in this case are whether the Chrysler Insurance policy complies with the no-fault act and, if not, whether the policy must be reformed.

C. VALIDITY OF THE CHRYSLER INSURANCE POLICY UNDER THE NO-FAULT ACT AND GROUNDS FOR REFORMATION

It is a "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent . . . a contract in violation of law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 469; 703 NW2d 23 (2005) (quotation marks and citation omitted). "Reformation of an insurance policy is an equitable remedy." *Titan Ins Co v Hyten*, 291 Mich App 445, 451; 805 NW2d 503 (2011), lv gtd 490 Mich 868 (2011) (quotation marks and citation omitted). "[A] policy in

full effect may be reformed." *Id.* "[C]ontracting parties are assumed to want their contract to be valid and enforceable." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002). Thus, when reasonably possible, this Court is obligated to construe insurance contracts that conflict with the no-fault act and, thus, violate public policy, in a manner that renders them "compatible with the existing public policy as reflected in the no-fault act." *Id.*; see also *State Farm Mut Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 40-41; 549 NW2d 345 (1996) (reforming an invalid no-fault policy to comply with the no-fault act when the policy improperly shifted statutory responsibility for providing no-fault coverage); *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 238; 531 NW2d 138 (1995) (reforming an invalid no-fault policy to provide coverage required by the no-fault act).

We conclude that the Chrysler Insurance policy is invalid under the no-fault act and requires reformation for two reasons: (1) Chrysler LLC and its United States subsidiaries, the named insureds in the policy, do not have an insurable interest and (2) the policy contravenes the legislative intent of the no-fault act.

1. INSURABLE INTEREST

" '[U]nder Michigan law, an insured must have an "insurable interest" to support the existence of a valid automobile liability insurance policy.' " *Morrison v Secura Ins*, 286 Mich App 569, 572; 781 NW2d 151 (2009), quoting *Allstate Ins Co v State Farm Mut Auto Ins Co*, 230 Mich App 434, 439; 584 NW2d 355 (1998). And, "the insurable interest must be that of a 'named insured.' " *Id.*, quoting *Allstate*, 230 Mich App at 440. "[A]n 'insurable interest' need not be in the nature of ownership, but rather can be any kind of benefit from

the thing so insured or any kind of loss that would be suffered by its damage or destruction." *Id.* at 572-573. An individual can have an insurable interest in a motor vehicle without having title to the vehicle. See *Clevenger v Allstate Ins Co*, 443 Mich 646, 661-662; 505 NW2d 553 (1993). For example, "[a] person obviously has an insurable interest in his own health and well-being. This is the insurable interest which entitles persons to personal protection benefits regardless of whether a covered vehicle is involved." *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 362; 764 NW2d 304 (2009) (quotation marks and citation omitted). "[T]he 'insurable interest' requirement arises out of long-standing public policy." *Morrison*, 286 Mich App at 572, citing *Allstate*, 230 Mich App at 438. "[P]ublic policy forbids the *issuance* of an insurance policy where the insured lacks an insurable interest." *Id.* at 573 (emphasis in original). A policy is void when there is not an insurable interest. *Id.* at 572; see also *Allstate*, 230 Mich App at 441.

Here, neither Chrysler LLC nor its United States subsidiaries have an insurable interest to support the existence of the Chrysler Insurance policy for personal protection, property protection, and residual liability insurance. Owners and registrants have an insurable interest in their motor vehicles because the no-fault act requires owners and registrants to carry no-fault insurance and MCL 500.3102(2) makes it a misdemeanor to fail to do so. See *Clevenger*, 443 Mich at 651, 661. The insurable interest of owners and registrants is, therefore, contingent upon "personal pecuniary damage created by the no-fault statute itself." *Id.* at 661. As Chrysler Insurance conceded during oral argument, Chrysler LLC and its United States subsidiaries are not owners or registrants of the Jeep Compass leased to the Corwins. MCL 500.3101(2)(h)(*ii*) and (i) expressly ex-

clude "a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days" from being either an owner or registrant. Thus, Chrysler LLC cannot be an owner or registrant of the Jeep Compass. Moreover, there is no evidence in the record indicating that a United States subsidiary of Chrysler LLC was an owner or registrant of the Jeep Compass. Therefore, Chrysler LLC and its United States subsidiaries do not have an insurable interest contingent upon "personal pecuniary damage created by the no-fault statute itself." See *Clevenger*, 443 Mich at 661.

Furthermore, Chrysler LLC and its United States subsidiaries lack any insurable interest flowing from protection of a person's "health and well-being" because they cannot suffer accidental bodily injury. See MCL 500.3114(1); *Roberts*, 282 Mich App at 362. Chrysler LLC and its United States subsidiaries also do not have an insurable interest entitling them to residual liability or property protection insurance. Residual liability insurance affords coverage for noneconomic loss caused by the "ownership, maintenance, or use of a motor vehicle . . . ." MCL 500.3135; see also *Citizens*, 448 Mich at 228-229. The owner or registrant of a motor vehicle has the primary duty to provide residual liability insurance. *Citizens*, 448 Mich at 235. "Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3121(1). A person claims property protection insurance benefits in the following order of priority: (1) insurers of owners or registrants of vehicles involved in the accident and (2) insurers of operators of

vehicles involved in the accident. MCL 500.3125. As previously discussed, Chrysler LLC and its United States subsidiaries are not owners or registrants of the Jeep Compass. Furthermore, they do not maintain, operate, or use the Jeep Compass to give rise to liability for residual liability or property protection insurance benefits. Chrysler LLC and its United States subsidiaries do not derive "any kind of benefit from [a] thing so insured" nor do they suffer "any kind of loss that would be suffered by its damage or destruction." See *Morrison*, 286 Mich App at 573.

Because Chrysler LLC and its United States subsidiaries do not have an insurable interest as the named insured in the Chrysler Insurance policy, the policy violates public policy. See *id.* at 572-573. Indeed, the entire policy is void—leaving John, the owner of the Jeep Compass, in violation of his statutory duty to maintain security for the payment of insurance benefits. See *id.* at 572; MCL 500.3101(1), (2)(h). The Chrysler Insurance policy must be reformed to be compatible with public policy so that there is an insurable interest belonging to the named insured. See *Morrison*, 286 Mich App at 572 (insurable interest must belong to the named insured); *Cruz*, 466 Mich at 599 (parties are assumed to want their contract to be valid); see also *Enterprise Leasing*, 452 Mich at 40-41 (reforming a no-fault policy to comply with the no-fault act when the policy improperly shifted statutory responsibility for providing no-fault coverage).

2. LEGISLATIVE INTENT

"Insurance policies are . . . subject to statutory regulation, and mandatory statutory provisions must be read into them." *Auto-Owners Ins Co v Martin*, 284

Mich App 427, 434; 773 NW2d 29 (2009). "Insurance policy provisions that conflict with statutes are invalid . . . ." *Id.*

In *Enterprise Leasing*, the Michigan Supreme Court held that a provision in a car rental agreement that shifted the primary responsibility of the vehicle owner to provide no-fault coverage was void. *Enterprise Leasing*, 452 Mich at 27. The three cases in *Enterprise Leasing* involved three rental agreements; each agreement provided that the renter and not the owner of the rented motor vehicle would provide all automobile insurance. *Id.* at 28-30. Each of the three renters was involved in a motor-vehicle accident while driving the rented motor vehicle; the accidents resulted in lawsuits for residual liability benefits. *Id.* The Court concluded that the provisions in the three rental agreements that shifted the responsibility for providing primary residual liability coverage from the owner to both the driver and the driver's insurer were void. *Id.* at 27. The Court explained that "it is the '*owner* or *registrant* of a motor vehicle' who must provide residual liability insurance under the [no-fault] act." *Id.* at 31-32, quoting *Citizens*, 448 Mich at 228, quoting MCL 500.3101(1) (emphasis in *Citizens*). Our Supreme Court stated that it "would not allow the rental car companies to avoid the Legislature's intent that a vehicle owner be primarily responsible for providing coverage." *Id.* at 36. Thus, the Court held that "the car rental companies and their insurers [were] required to provide primary residual liability coverage for the permissive use of the rental cars, up to their policy limits or the minimum required by statute." *Id.*

The Michigan Supreme Court has explained that, in enacting MCL 500.3114 and MCL 500.3115,

> the Legislature, in its broader purpose, intended to provide benefits whenever, as a general proposition, an insured is injured in a motor vehicle accident, whether or not a registered or covered motor vehicle is involved; and in its narrower purpose intended that an injured person's personal insurer stand *primarily* liable for such benefits whether or not its policy covers the motor vehicle involved and even if the involved vehicle is covered by a policy issued by another no-fault insurer. [*Lee v Detroit Auto Inter-Ins Exch*, 412 Mich 505, 515; 315 NW2d 413 (1982) (emphasis added).]

See also *Underhill v Safeco Ins Co*, 407 Mich 175, 191; 284 NW2d 463 (1979) ("It is our understanding of the legislative purpose that it was intended that injured persons who are insured or whose family member is insured for no-fault benefits would have primary resort to their own insurer."). "The 'injured person's personal insurer' is, of course, the insurance company providing no-fault insurance in his household which was purchased by an 'owner or registrant of a motor vehicle.' " *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 697; 671 NW2d 89 (2003) (some quotation marks and citations omitted).

As in *Enterprise Leasing*, the Chrysler Insurance policy in this case violates the intent of the no-fault act by shifting primary liability for no-fault coverage. More specifically, the policy contravenes the legislative intent of MCL 500.3114 and MCL 500.3115 of the no-fault act because the policy enables Chrysler Insurance to avoid primary liability for PIP benefits that are payable to injured people that Chrysler Insurance personally insures, i.e., the Corwins. See *Lee*, 412 Mich at 515. Under the no-fault act, John is the "owner" of the Jeep Compass leased from Chrysler LLC because John leased the Jeep Compass for more than 30 days. See MCL 500.3101(2)(h)(*i*). Moreover, John purchased no-fault

insurance for the Jeep Compass through Chrysler Insurance because the insurance premium was deducted from his monthly pension checks. Thus, Chrysler Insurance provided no-fault insurance to the Corwin household and was the Corwins' "personal insurer." See *Farmers Ins Exch*, 256 Mich App at 697. Nevertheless, under the terms of its insurance policy, Chrysler Insurance avoids primary liability under MCL 500.3114. As previously discussed, Chrysler LLC and its United States subsidiaries are the named insureds under the Chrysler Insurance policy. Thus, Chrysler Insurance avoids primary liability for PIP benefits under MCL 500.3114 whenever the Corwins are a named insured in another no-fault policy in their household. Essentially, the Chrysler Insurance policy's designation of Chrysler LLC and its United States subsidiaries as the named insureds is a coordination-of-benefits clause in disguise. The Chrysler Insurance policy relegates motor-vehicle owners to contingent beneficiaries as permissive users on their own insurance policies.

We will not allow Chrysler Insurance to avoid the Legislature's intent that an injured person's personal insurer stand *primarily* liable for PIP benefits. See *Lee*, 412 Mich at 515; *Enterprise Leasing*, 452 Mich at 36. The Chrysler Insurance policy must be reformed to be "compatible with the existing public policy as reflected in the no-fault act." See *Cruz*, 466 Mich at 599; see also *Enterprise Leasing*, 452 Mich at 40-41 (reforming a car rental agreement to comply with the no-fault act when the agreement improperly shifted statutory responsibility for providing no-fault coverage). Consistent with the intent of the Legislature, we must reform the policy so that Chrysler Insurance is primarily liable (along with Auto Club and Foremost) for PIP benefits in accordance with MCL 500.3114(1).

D. REFORMATION OF THE NAMED INSURED AND THE PRIORITY IMPLICATIONS UNDER MCL 500.3114(1)

We conclude that the Chrysler Insurance policy must be reformed to include both John and Vera-Anne as "named insureds" who fall within the policy's definition of "you." In this case, John qualified for the lease program as a Chrysler LLC retiree, and the insurance premiums for the Jeep Compass were deducted from his pension. Moreover, the Chrysler defendants pleaded the following in their answer in response to the allegation in Auto Club and the Corwins' complaint that *the Corwins* had an insurance policy with Chrysler Insurance for the Jeep Compass at the time of the accident: "These Defendants plead No Contest that at the time of the collision, *the Corwins* had a policy of insurance issued by DCIC." (Emphasis added.)

The liability of Auto Club, Foremost, and Chrysler Insurance for John's and Vera-Anne's PIP benefits is governed by MCL 500.3114(1). As previously discussed, MCL 500.3114(1) states the following:

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. A personal injury insurance policy described in [MCL 500.3103(2)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident. *When personal protection insurance benefits* or personal injury benefits described in [MCL 500.3103(2)] *are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all*

> *of the benefits and is not entitled to recoupment from the other insurer.* [MCL 500.3114(1) (emphasis added).]

In *Detroit Auto*, the Michigan Supreme Court discussed the proper application of MCL 500.3114(1). See *Detroit Auto*, 428 Mich at 47-48. In that case, Vernon Piche died in a motor-vehicle accident while driving his wife Patricia's 1977 Mercury Cougar. *Id.* at 44. Vernon and Patricia lived together at the time of the accident. *Id.* Vernon and Patricia had six motor vehicles in their household (several of which were driven by their children). *Id.* All the vehicles were insured by either Detroit Automobile Inter-Insurance Exchange (DAIIE) or Home Insurance Company (Home Insurance). See *id.* at 44 n 3. The owners, insurers, named insureds, and principal drivers for each vehicle were as follows:

	Vehicle	Insurer	Owner	Named Insured	Other Named Insured	Principal Driver
1977	Mercury Cougar	DAIIE	Patricia	Patricia	Vernon[5]	Patricia
1969	Chevrolet stake truck	Home	Vernon	Vernon		Vernon
1971	Ford pickup truck	DAIIE	Patricia	Patricia	Vernon[6]	Vernon
1973	Ford Mustang	DAIIE	Patricia	Patricia		Paul
1973	Pontiac Catalina	DAIIE	Patricia	Peter	Patricia	Peter
1975	Plymouth Fury	DAIIE	Vernon	Steven	Vernon	Steven

[5] Although Vernon was not listed as a named insured for the Mercury Cougar, the DAIIE insurance policy for the Mercury Cougar included the named insured's spouse within the definition of "named insured." *Detroit Auto*, 428 Mich at 48 n 12. Thus, Vernon was a named insured for the Mercury Cougar.

[6] In *Detroit Auto*, DAIIE conceded that a person listed as a "principal driver" in its policies was a "named insured." *Detroit Auto*, 428 Mich at 45 n 4. Thus, although not listed as a named insured, Vernon was a named insured on the DAIIE policy for the Ford pickup truck. *Id.*

In analyzing whether DAIIE, Home Insurance, or both were responsible for paying Vernon's PIP benefits, the Court recognized that MCL 500.3114(1)[7] applied. *Detroit Auto*, 428 Mich at 47. The Court concluded that both DAIIE and Home Insurance were of equal priority for Vernon's PIP benefits, opining as follows, in pertinent part:

> The first sentence of [MCL 500.3114(1)] provides that Vernon Piche was covered by the insurance policy that DAIIE issued to his wife, Patricia Piche, as owner of the 1977 Mercury Cougar. Thus he could collect under either policy. The second sentence of [MCL 500.3114(1)] then gives the answer to the present dispute: Since benefits would be payable by either the insurer(s) of the injured person (Vernon Piche), or the insurer of the injured person's spouse (Patricia Piche), the benefits are to be paid by the insurer(s) of Vernon Piche.
>
> Since DAIIE and Home Insurance each had issued a policy that named Vernon Piche as an insured operator, these two insurers are of equal priority. [*Id.* at 47-48.]

Under *Detroit Auto*, Auto Club, Foremost, and Chrysler Insurance are of equal priority for John's PIP benefits because John is a named insured on their policies. However, because Vera-Anne is a named insured on only the Auto Club and Chrysler Insurance

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[7] In *Detroit Auto*, MCL 500.3114(1) did not include the present language regarding MCL 500.3103(2). Rather, MCL 500.3114(1) read as follows:

> Except as provided in subsections (2) and (3), a personal protection insurance policy applies to accidental bodily injury to the person named in the policy, his spouse, and a relative of either domiciled in the same household. When personal protection insurance benefits are payable to or for the benefit of an injured person under his own policy and would also be payable under the policy of his spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and shall not be entitled to recoupment from the other insurer. [*Detroit Auto*, 428 Mich at 47.]

policies, Auto Club and Chrysler Insurance are primarily liable for Vera-Anne's PIP benefits, but Foremost is not. PIP benefits are payable to Vera-Anne under her own Auto Club and Chrysler Insurance policies, and, although they would also be payable to Vera-Anne under her spouse's policy with Foremost, Vera-Anne's insurers (Auto Club and Chrysler Insurance) must pay all her PIP benefits pursuant to MCL 500.3114(1). See *Detroit Auto* at 47-48; MCL 500.3114(1).

Accordingly, upon reformation, Auto Club, Foremost, and Chrysler Insurance are equally liable for John's PIP benefits. Auto Club and Chrysler Insurance are equally liable for Vera-Anne's PIP benefits. We remand to the trial court to determine the amount of each insurer's liability and to order the appropriate reimbursement under MCL 500.3115(2).

Reversed and remanded. We do not retain jurisdiction.

BORRELLO, P.J., and BECKERING and GLEICHER, JJ., concurred.

RODENHISER v DUENAS

Docket No. 303192. Submitted April 12, 2012, at Grand Rapids. Decided April 17, 2012, at 9:20 a.m. Leave to appeal denied, 493 Mich 856.

Connie G. Rodenhiser and Jeannie Rodenhiser, personal representatives of their sister Ellen S. Mullin's estate, filed an action in the Kalamazoo Circuit Court, seeking to annul Mullin's marriage to Rene Marco Duenas on the basis of fraud and Mullin's having been legally incompetent to marry. Mullin had been diagnosed with cancer in 2008 and was hospitalized because of her condition by October 2009. She and Duenas were married at the hospital the night of October 29, 2009, without the knowledge of Mullin's family. Connie Rodenhiser arranged for Mullin to execute a durable power of attorney on October 30, 2009, appointing their mother as Mullin's patient advocate. Mullin's family learned of Mullin and Duenas's marriage after her death on November 8, 2009. The court, Curtis J. Bell, J., granted Duenas's motion to dismiss under MCR 2.504(B)(2), concluding that plaintiffs had failed to prove that Mullin was legally incompetent to enter into a marriage. Plaintiffs appealed by leave granted.

The Court of Appeals *held*:

1. There is a strong presumption regarding the validity of a ceremonial marriage that can only be overcome with clear and positive proof that the marriage was not valid. In general, under MCL 552.3, only the parties to a marriage can commence an annulment action. However, under MCL 552.35, a party's next friend may bring an annulment action on the grounds that a party to the marriage was not capable in law of contracting because of mental incompetence. A party is legally competent to contract if he or she possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which he or she was engaged. A contract may be avoided only if the person was of unsound mind or insane when it was made and the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract.

2. The circuit court did not clearly err by granting Duenas's motion to dismiss. Plaintiffs failed to present clear and definite

proof that Mullin was of unsound mind to the extent that she had no reasonable perception of the nature and effect of the marriage agreement she entered into with Duenas. Mullin and Duenas had been involved in a longstanding relationship at the time of their marriage and were living together at the time she entered the hospital in 2009. Mullin's medical records and her doctor's testimony established that during the relevant period Mullin was alert at times, able to comprehend her surroundings, was easily roused from sleep, and communicated appropriately with nurses. Connie Rodenhiser, who did not question Mullin's competence until after she learned of the marriage, had arranged for Mullin to execute a durable power of attorney the morning after the marriage ceremony, and the attorney who drafted the document attested that Mullin was of sound mind and not under any duress when she signed the document. Expert testimony that Mullin was prescribed drugs that had a high probability of creating mental changes that interfered with her thought process did not constitute clear and positive proof that she was of unsound mind.

3. An action to annul a marriage on the basis of fraud can only be brought by the defrauded spouse while both parties to the marriage are living, and the marriage cannot be annulled by the heirs of the spouse or other third parties, such as next friend. Plaintiffs' complaint was properly dismissed because plaintiffs were third parties and lacked legal standing to challenge Mullin's marriage to Duenas on the grounds of fraud.

Affirmed.

1. CONTRACTS — MARRIAGE CONTRACTS — ANNULMENT — INCOMPETENCE OF PARTY TO MARRIAGE.

There is a strong presumption regarding the validity of a ceremonial marriage that can only be overcome with clear and positive proof that the marriage was not valid; in general, only the parties to a marriage can commence an annulment action; however, a party's next friend may bring an annulment action on the grounds that a party to the marriage was not capable in law of contracting because of mental incompetence; a party is legally competent to contract if he or she possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which he or she was engaged; a contract may be avoided only if the person was of unsound mind or insane when it was made and the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract (MCL 552.3; MCL 552.35).

2. CONTRACTS — MARRIAGE CONTRACTS — ANNULMENT — FRAUD.

A marriage is void if consent was obtained by fraud; an action to annul a marriage on the basis of fraud can only be brought by the defrauded spouse while both parties to the marriage are living, and the marriage cannot be annulled by the heirs of the spouse or other third parties, such as next friends (MCL 552.2; MCL 552.3).

Strain, Murphy & Vander Wal, PC, (by *Stephen L. Elkins*), for Connie G. and Jeannie Rodenhiser.

Miller Johnson (by *W. Jack Keiser* and *Richard E. Hillary, II*) for Rene Duenas.

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM. In this action for annulment, plaintiffs Connie G. Rodenhiser and Jeannie Rodenhiser, personal representatives of the estate of Ellen S. Mullin, appeal by leave granted an order entered by the Kalamazoo Circuit Court granting defendant Rene Marco Duenas' motion to dismiss plaintiffs' complaint. We affirm.

I. FACTS

In April 2008, Ellen Mullin, age 50 at the time, was diagnosed with cancer of the tongue. She had part of her tongue removed that year; however, the cancer spread to her lymph nodes, and in April 2009 she underwent chemotherapy. Mullin's health deteriorated and she was admitted to Bronson Hospital on October 24, 2009, with stage-4 cancer. Plaintiffs are Mullin's sisters, Connie and Jeannie, who were appointed as personal representatives following Mullin's death.

On October 28, 2009, Connie, Mullin, and their mother met with a physician to discuss a possible transfer to hospice care. Connie spent that night and

much of October 29 at the hospital with Mullin. It was her observation that Mullin was "in and out of it a lot" and that she was "pretty sedated" and "having hallucinations." Connie finally left the hospital at about 9:00 p.m. Shortly thereafter, defendant came to spend the night; Connie did not know that defendant had planned a wedding for that night. At approximately 10:30 p.m., defendant and Mullin were married in a ceremony performed by Reverend Jeanne R. Kucks and witnessed by the nurse on duty that evening, Rebecca Bussey, R.N., and a man named Timothy N. Dickmon.

On October 30, 2009, Connie arranged to have an attorney appear at the hospital so that Mullin could execute a durable power of attorney appointing her mother as her patient advocate. The attorney, Paul Vlachos, signed a witness statement in which he attested that "the person who signed appears to be of sound mind and under no duress, fraud, or undue influence . . . ." Unfortunately, Mullin's overall condition never improved; she was transferred to hospice care, where she died on November 8, 2009. Following her death, Mullin's family learned of the marriage.

On November 20, 2009, plaintiffs filed a complaint for annulment. Plaintiffs presented their proofs at a two-day bench trial. At the close of their proofs, defendant made a motion to dismiss plaintiffs' action, which the trial court granted. The court found that plaintiffs had not carried their burden of proving that Mullin was legally incompetent to enter into a marriage contract at the time of the marriage ceremony.

II. STANDARD OF REVIEW

An action to annul a marriage is equitable in nature. MCL 552.12. This Court reviews de novo matters of equity. *Schmude Oil Co v Omar Operating Co*, 184 Mich

App 574, 582; 458 NW2d 659 (1990). This Court reviews for clear error a trial court's decision on a motion for dismissal under MCR 2.504. *Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich App 386, 389; 239 NW2d 380 (1976). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court . . . is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

III. COMPETENCE

Plaintiffs assert that the trial court clearly erred by granting defendant's motion to dismiss. They argue that the evidence submitted was sufficient to overcome the presumption of the validity of Mullin's marriage and that they presented sufficient evidence to prove that Mullin lacked the legal capacity to contract at law. We disagree.

In Michigan, there is a strong presumption regarding the validity of a ceremonial marriage. *In re Adams Estate*, 362 Mich 624, 627; 107 NW2d 764 (1961). Indeed, this presumption is one of the "strongest known to the law." *Id*. The presumption can only be overcome with "clear and positive proof" that the marriage was not valid. *Quinn v Quinn*, 4 Mich App 536, 538; 145 NW2d 252 (1966).

MCL 552.1 provides in relevant part:

> If solemnized within this state, a marriage that is prohibited by law because of consanguinity or affinity between the parties, because either party had a wife or husband living at the time of solemnization, *or because either party was not capable in law of contracting at the time of solemnization* is absolutely void. [Emphasis added.]

Generally, only the parties to a marriage can commence an action for annulment. MCL 552.3 provides:

> When a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the 2 preceding sections; either party, excepting in the cases where a contrary provision is hereinafter made, may file a petition or bill in the circuit court of the county, where the parties or 1 of them, reside, or in the court of chancery for annulling the same and such petition or bill shall be filed and proceedings shall be had thereon as in the case of a petition or bill filed in said court for a divorce; and upon due proof of the nullity of the marriage, it shall be declared void by a decree or sentence of nullity.

However, a party's next friend may bring an action to annul a marriage on grounds that "a party to the marriage was not capable in law of contracting . . . ." MCL 552.35. A person is incapable in law of contracting when that person is mentally incompetent. *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993). As noted by this Court in *Erickson Estate*,

> [t]he test of mental capacity to contract is whether the person in question *possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged*. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, *but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract*. [*Id*. (emphasis added).]

We conclude that plaintiffs failed to show by "clear and definite proof" that Mullin was of unsound mind to the extent that she had no reasonable perception of the nature and effect of the marriage agreement she consummated with defendant. *Id.*; *Quinn*, 4 Mich App at 538.

First, this was not a situation in which Mullin met and married a man when she was gravely ill. Rather, Mullin knew defendant, had a longstanding romantic relationship with him, and cohabited with him before her terminal illness. Connie testified that Mullin met defendant in 1996 and that the two started dating in 2000. Defendant moved in with Mullin in 2001, then left and moved to Arizona following alleged infidelity. Mullin stayed in contact with defendant and later moved to Arizona to live with him in 2003. She stayed there for one school year before returning to Michigan. In 2007, defendant returned to Michigan, and he and Mullin purchased a house and lived together. At the time she was admitted to the hospital in 2009, Mullin was living with defendant.

Second, although evidence showed that Mullin was in poor health and suffered from confusion, fatigue, and multiple other ailments, according to Dr. Radhakrishna Vemuri, Mullin's treating oncologist, there were times when she was alert and able to comprehend her surroundings. Specifically, Vemuri testified that patients will drift in and out of alertness. He testified that Mullin was not "very sick" every time he saw her once her calcium levels improved. Specifically, one day before the marriage, Mullin was able to converse with Vemuri about a potential transfer to University of Michigan Hospital. In addition, Vemuri testified that he wrote the letter suggesting that Mullin needed decision-making assistance at Connie's request and that at the time he did not think that Mullin was totally incapacitated; instead, Vemuri testified that he thought that Mullin only needed "some support" in making decisions. He did not alert the appropriate hospital committee that Mullin was incompetent and did not testify that Mullin was incapable of deciding to be married on October 29.

Third, the medical records supported a finding that Mullin had been alert enough during the relevant time to comprehend her surroundings. The nursing notes for October 29 at 9:00 a.m. indicated that Mullin was "oriented to" "person, place, time" and that her affect, appearance, and behavior were "appropriate to the situation." At 8:30 p.m. that evening, the nurse on duty indicated that Mullin was awake and easily aroused from sleep, and the nurse made an entry for Mullin's "psychosocial assessment." The nurse indicated that Mullin's affect, appearance, and behavior were "appropriate to the situation," that Mullin "interacts" and "makes decisions," and that her mood was appropriate to the situation and further noted "real interp of event" and "understands proc[edure]." The nurse noted that Mullin was "alert, oriented x 3, approp vrbl resp, awake, denies numbness, denies tingling, denies vision ch, no agitation, no facial droop, no seizures . . . ." Later that evening, at 10:10 p.m., the nurse noted that Mullin was "awake in bed."

The following morning, October 30 at 9:00 a.m., the nurse on call made similar entries in the record. She indicated that Mullin's affect, appearance, and behavior were "appropriate to the situation." A physician's assistant also saw Mullin that morning and indicated that Mullin was "alert, oriented x 3, approp vrbl resp, awake, coordination nrm," but noted that Mullin's speech was "garbled." At 8:00 p.m. that evening, a nurse noted that Mullin was "alert, oriented x 3, approp vrbl resp, no agitation, no seizures . . . ." She also noted that Mullin's "affect, appearance, behavior" were "appropriate to the situation" and that Mullin "interacts with env" and "makes decisions" and also noted "mood approp [to] sit, real intrp event, understands proc." The nurse noted that Mullin's family was "complaining, controlling, demanding, hovering, uncooperative." Two hours later,

Mullin awakened "easily," and the nurse shampooed Mullin's hair and massaged her head. Mullin indicated, "That feels so good." The nurse noted: "Pt appears tired, family is demanding of pt for responses, answers. Encouraged family to allow pt to sleep. Will continue to monitor." The nurse also noted: "Pt requests lopressor, colace, senokot that she refused earlier after pressure from family members. Pt states that she wants the medication now when asked for confirmation." Later, at about midnight, the nurse noted that Mullin was easily aroused from sleep.

In sum, the relevant medical records show that at times Mullin was alert and able to comprehend her surroundings. Nurses indicated that Mullin was easily aroused from sleep, and Mullin communicated with nurses and made requests. The nursing staff questioned Mullin at times and accepted Mullin's request for medication over objections from her family.

Fourth, evidence that Connie had a lawyer come to the hospital to execute a durable power of attorney further supports a finding that Mullin was of sound mind and able to comprehend her surroundings at times while she was in the hospital. Specifically, Connie arranged for an attorney to appear on October 30. The attorney executed the durable power of attorney and attested that Mullin was of "sound mind" and not under any duress when she signed the document. Neither Connie nor any other member of Mullin's family questioned her capacity to execute the durable power of attorney at that time, and the issue of competency was only raised after the family learned of the marriage.

Fifth, the testimony of plaintiffs' numerous medical witnesses did not establish by clear and positive proof

that Mullin had no reasonable perception of the nature and effect of the marriage agreement.

Plaintiffs' expert witness, Dr. Wayne Grant, a clinical pharmacist, stated in his opinion letter that fentanyl could cause drowsiness, fatigue, confusion, impaired cognition, asthenia, dizziness, headache, nervousness, sleep disturbances, dysphoria, euphoria, lightheadedness, alterations of mood, tremor, abnormal gait and/or coordination (ataxia), amnesia, abnormal dreams, agitation, paresthesias, paranoia, and anxiety, and hallucinations. He also indicated that promethazine and hydrocodone can cause many of these same reactions. He concluded as follows: "It is of [sic] my clinical impression with a reasonable degree of medical certainty that Ms. Mullin's multiple drug therapies in conjunction with her multiple disease states did compromise her ability to discuss and execute complex decisions, such as entering into a the [sic] decision of marriage." However, at his deposition, Grant testified that "I'm not stating she had all these things occur." He indicated that confusion and sedation issues do arise in a majority of patients who receive the drugs Mullin was prescribed, but he stated that sometimes the patients can have periods of alertness.

Grant's testimony established that Mullin was prescribed drugs that had a high probability of creating "mental changes" that interfered with her thought process. This testimony did not amount to "clear and positive proof" that Mullin was of unsound mind to the extent that she had no reasonable perception of the nature and effect of the marriage. *Erickson Estate*, 202 Mich App at 332. The medications certainly could have had a negative effect on Mullin's mental capacity, but there was no proof that Mullin's capacity was so dimin-

ished that she lost all reasonable perception of the nature and effect of the marriage.

In sum, plaintiffs failed to show that Mullin was incompetent to contract at law given that Mullin knew defendant and had a longstanding relationship with him; Vemuri's testimony showed that there were times when Mullin was alert and able to comprehend her surroundings during her stay at Bronson; medical records supported that there were times when Mullin was alert and able to comprehend her surroundings; one day after the marriage, Connie arranged to have Mullin execute a durable power of attorney in which the attorney attested that Mullin was of sound mind; the testimony of plaintiffs' numerous medical witnesses did not establish that Mullin lacked all reasonable perception of the nature and effect of the marriage agreement on October 29, 2009; and Connie's credibility was undermined because she arranged for Mullin to execute a durable power of attorney the day after her marriage to defendant, and did not question Mullin's competency until after she learned of the marriage.

IV. STANDING TO ASSERT FRAUD

Plaintiffs argue that they have standing to contest the validity of Mullin's marriage on the grounds of fraud or duress. We disagree.

Michigan law provides a few narrow grounds on which a marriage may be declared void. MCL 552.1 provides that a marriage is void for the following reasons:

> If solemnized within this state, a marriage that is prohibited by law because of consanguinity or affinity between the parties, because either party had a wife or husband living at the time of solemnization, or because

> either party was not capable in law of contracting at the time of solemnization is absolutely void. The issue of such a marriage are legitimate.

MCL 552.2 provides that a marriage is void under several other circumstances, including fraud:

> In case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such non-age, and not cohabit together afterwards, or in case the *consent of 1 of the parties was obtained by force or fraud*, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be deemed void, without any decree of divorce or other legal process. [Emphasis added.]

MCL 552.3 provides a procedure *for the parties to the marriage* to annul a marriage that is allegedly void on any of the grounds set forth in MCL 552.1 or MCL 552.2:

> When a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the 2 preceding sections; *either party*, *excepting in the cases where a contrary provision is hereinafter made*, may file a petition or bill in the circuit court of the county, where the parties or 1 of them, reside, or in the court of chancery for annulling the same and such petition or bill shall be filed and proceedings shall be had thereon as in the case of a petition or bill filed in said court for a divorce; and upon due proof of the nullity of the marriage, it shall be declared void by a decree or sentence of nullity.

The only provision allowing a third party to file a petition or bill to annul a marriage is contained in MCL 552.35, which provides:

> If, at the time of a marriage, a party to the marriage *was not capable in law of contracting*, an individual admitted by the court as the party's next friend may bring an action to annul the marriage. [Emphasis added.]

"The right to annul a voidable marriage is a personal right and the action for annulment of such a marriage can be maintained only by a party to the marriage contract. Some statutes expressly require that a suit to annul a voidable marriage be brought and prosecuted by the party laboring under the disability claimed to render the marriage voidable. Therefore, a third person cannot, as a general rule, maintain an action to annul a marriage which is merely voidable." 4 Am Jur 2d, Annulment of Marriage, § 59, pp 584-585 (2007), citing *In re Davis Estate*, 55 Or App 982; 640 P 2d 692 (1982), *Dibble v Meyer*, 203 Or 541; 278 P2d 901 (1955), and *Tabak v Garay*, 237 AD2d 510; 655 NYS2d 92 (1997). Further, "[a]n action to annul a marriage on the ground of fraud can only be brought by the defrauded spouse while both parties to the marriage are living. It cannot be annulled at the suit of the heirs of the spouse imposed upon or other third persons." *Id*., § 60, p 585 (2007), citing *Gibbons v Blair*, 376 NW2d 22 (ND, 1985); *Norris v Harrison*, 91 Us App DC 103; 198 F2d 953 (1952); *In re Succession of Ricks*, 893 So 2d 98 (La App, 2004).

We conclude that it is proper to apply to this case the general proposition that an action to annul a marriage on the ground of fraud can only be brought by the defrauded spouse while both parties to the marriage are living and the marriage cannot be annulled by the heirs of the spouse or other third persons, such as next friends. We make this conclusion based on our interpretation of the statutes cited earlier.

In construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). In doing so,

> [t]his Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. [*Id*. at 191-192 (quotation marks and citations omitted).]

In this case, the applicable statutes clearly and unambiguously provide that third parties do not have standing to bring suit to annul a marriage on the ground that it was procured by fraud. Specifically, MCL 552.3 states that, unless otherwise provided, "*either party*" may petition to annul a marriage on grounds that it is void due to the reasons set forth in the two preceding statutory sections (one of which includes fraud). The phrase "either party" clearly refers to parties to the allegedly void marriage.

First, the Legislature used the phrase "either party" as opposed to "a party." The word "either "means "one or the other of two." *Random House Webster's College Dictionary* (2001). The only two people who can be involved in a marriage are the man and woman who agreed to it. See Const 1963, art 1, § 25. Given the context of the statute at issue, the plain language used can be interpreted in no other way except as providing that suits for annulment on the ground that the marriage was procured by fraud can only be commenced by "either party" to the marriage at issue. See *McCormick*, 487 Mich at 191-192 (recognizing that a court should consider the plain meaning of the words used).

Second, other sections of the statutes that apply to divorce and annulment, MCL 552.1, *et seq*., refer to "parties" as "parties to the marriage." For example, MCL 552.1 refers to "a marriage that is prohibited by law because of consanguinity or affinity *between the parties* . . . ." (Emphasis added.) MCL 552.2 similarly refers to parties as "parties to the marriage" through use of the language "[i]n case of a marriage solemnized when *either of the parties* . . . ." (Emphasis added.) Finally, MCL 552.36 provides:

> *A party to a marriage* who, at the time of the marriage, was not capable in law of contracting and who later becomes capable in law of contracting may bring an action to annul the marriage. The court shall not, however, annul the marriage if the court finds that *the parties cohabited as husband and wife* after the party became capable in law of contracting. [Emphasis added.]

See *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) ("[u]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute.").

Third, the Legislature provided that a third-party next friend can bring suit to annul a marriage in only one circumstance—when a party to the marriage is incapable of contracting at law. MCL 552.35. The Legislature's inclusion of only one ground on which a third party can bring suit to annul a marriage necessarily indicates that it did not intend that third parties could bring suit to annul a marriage on any and all of the grounds enumerated in the statute. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74-75; 711 NW2d 340 (2006) (explaining the legal maxim of statutory construction "*expressio unius est exclusio alterius*"—"[t]he expression of one thing is the exclusion of another").

In sum, under MCL 552.35, a party's next friend can bring an action to annul a marriage on the ground that the party lacked legal capacity to contract. However, pursuant to MCL 552.3, a complaint for annulment based on fraud can only be brought by one of the parties to the marriage. Therefore, plaintiffs, as third parties, lacked legal standing to challenge Mullin's marriage to defendant on the ground of fraud and this aspect of their complaint was properly dismissed on that basis.

Affirmed.

BECKERING, P.J., and OWENS and RONAYNE KRAUSE JJ., concurred.

GREENVILLE LAFAYETTE, LLC v ELGIN STATE BANK

Docket No. 308450. Submitted April 10, 2012, at Lansing. Decided April 17, 2012, at 9:25 a.m.

Greenville Lafayette, LLC, obtained a loan from Elgin State Bank and, to secure the loan, entered into a separate mortgage over certain of its property in Montcalm County. The loan was also secured by two separate commercial guaranties by Avi Banker and Ahron Shulman. The loan matured and there was an outstanding balance and attempts to renegotiate and extend the mortgage were unsuccessful. The bank brought an action to collect on the two commercial guaranties. The next month, while the action regarding the guaranties was still pending, the bank sent Greenville a notice of mortgage foreclosure sale that informed Greenville of the bank's intent to foreclose by advertisement on Greenville's real property. Greenville filed a complaint in the Montcalm Circuit Court, seeking an injunction against the foreclosure sale and a declaratory judgment stating that the bank was not entitled to proceed with the foreclosure sale pursuant to MCL 600.3204(1)(b). The bank moved for summary disposition, arguing that Michigan law permits foreclosure by advertisement while an action is pending against a guarantor. The court, Suzanne Hoseth Kreeger, J., agreed with the bank, granted the bank's motion for summary disposition, and dismissed the action. Greenville appealed.

The Court of Appeals *held*:

Under Michigan law, a creditor generally may simultaneously proceed against a guarantor and foreclose on mortgaged property because the guarantee is an obligation separate from the mortgage note. In this case, however, the mortgage contract specifically includes the guaranties in the indebtedness secured by the mortgage. The guaranties are not obligations that are separate from the mortgage note. The action that was instituted against the guarantors constituted an action to recover the debt secured by the mortgage. The bank's foreclosure by advertisement was invalid pursuant to the one-action rule provided in MCL 600.3204(1)(b), which provides that a foreclosure by advertisement is permitted only if an action or proceeding has not been instituted, at law, to

recover the debt secured by the mortgage or any part of the mortgage. The trial court erred by granting summary disposition in favor of the bank.

Reversed.

MORTGAGES — GUARANTORS — FORECLOSURES BY ADVERTISEMENT — ONE-ACTION RULE.

A creditor generally may simultaneously proceed against a guarantor and foreclose on mortgaged property because a guarantee is generally an obligation separate from the mortgage note; where the guaranties are specifically included in the mortgage debt by the terms of the mortgage agreement, the guaranties are not obligations that are separate from the mortgage note and an action that is instituted against the guarantors constitutes an action to recover the debt secured by the mortgage for purposes of the one-action rule that provides that a foreclosure by advertisement is permitted only if an action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage (MCL 600.3204[1][b]).

Miller Johnson (by *Robert W. O'Brien* and *Joseph J. Gavin*) for plaintiff.

McShane & Bowie, P.L.C. (by *Andrew C. Shier*), for defendant.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order dismissing its complaint, which sought an injunction against defendant's foreclosure by advertisement. Because we conclude that the plain language of MCL 600.3204 bars defendant's foreclosure action, we reverse.

This case arises out of defendant-mortgagee's foreclosure by advertisement of plaintiff-mortgagor's real property in Montcalm County. In early June 2007, plaintiff and defendant entered into a "Business Loan Agreement" for approximately $1.8 million. The same day, the parties entered into a separate mortgage agree-

ment to secure defendant's loan to plaintiff. In the mortgage agreement, plaintiff mortgaged to defendant real property it owned in Montcalm County. The $1.8 million loan was also secured by two separate commercial guaranties, each in the amount of $300,000, executed by Avi Banker and Ahron Shulman.

The loan matured on June 6, 2011, with plaintiff owing defendant an outstanding balance of approximately $1.7 million. Attempts to renegotiate and extend the mortgage were unsuccessful, and defendant sued to collect on the two commercial guaranties in August 2011. The next month, while the action regarding the guaranties was still pending, defendant sent plaintiff its "Notice of Mortgage Foreclosure Sale," which informed plaintiff of defendant's intent to foreclose by advertisement on plaintiff's real property.

On October 20, 2011, plaintiff filed its complaint. Plaintiff sought an injunction against defendant's pending foreclosure sale and a declaratory judgment stating that defendant was not entitled to proceed with the foreclosure sale according to MCL 600.3204(1)(b). Defendant answered the complaint, and subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(8), arguing that Michigan law permits foreclosure by advertisement while an action is pending against a guarantor. After hearing oral arguments, the trial court granted defendant's motion for summary disposition and held as a matter of law that defendant was entitled to foreclose by advertisement notwithstanding the existing legal action against the guarantors. Plaintiff now appeals the trial court's order.

We review de novo a decision on a motion for summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests

the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. Summary disposition is only appropriate when "the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). We also review questions of statutory and contract interpretation de novo. *Adair v Mich*, 486 Mich 468, 477; 785 NW2d 119 (2010); *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

The statute at issue in this case, MCL 600.3204(1), provides:

> Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
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> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

"The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). The

language is read according to its "ordinary and generally accepted meaning." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 599; 575 NW2d 751 (1998). "Where the language of a statute is clear, [this Court] will enforce the statute as written because the Legislature must have intended the meaning it plainly expressed." *Id.*

The parties agree that §§ 3204(1)(a), (c), and (d) are satisfied. Accordingly, the outcome of this case turns on the interpretation of § 3204(1)(b); whether "[a]n action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage . . . ." In the trial court, the parties relied on *United States v Leslie*, 421 F2d 763, 766 (CA 6, 1970),[1] to support their arguments regarding the proper interpretation of the statute. Plaintiff argued that *Leslie* is distinguishable from the instant case, whereas defendant argued that this case is factually similar to *Leslie*. The trial court adopted the reasoning of defendant and granted summary disposition in its favor.

Under Michigan law, a creditor generally may simultaneously proceed against a guarantor and foreclose on a mortgaged property because the guaranty is an obligation separate from the mortgage note. *Id.* See also *Mazur v Young*, 507 F3d 1013, 1019 (CA 6, 2007) (deciding issue under Michigan law, stating "[t]hat a guaranty agreement is an independent, collateral agreement is what allows a seller to proceed against a guarantor without having first exhausted the foreclosure remedy against the buyer.").[2] In *Church & Church,*

[1] The statute at issue in *Leslie* was a previous version of MCL 600.3204 that was substantially the same in all material respects.

[2] Decisions of the federal courts of appeals are persuasive, but not binding. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Inc v A-1 Carpentry, 281 Mich App 330, 341; 766 NW2d 30 (2008), vacated in part and aff'd in part on other grounds 483 Mich 885 (2009), this Court relied on the decision in *Leslie* in interpreting MCL 600.3204, stating:

> [T]he intention of the Legislature with respect to the foreclosure statutes was to force an election of remedies by a mortgagee concerning a single debt: i.e., the same mortgagee cannot simultaneously maintain a lawsuit for judicial foreclosure and a foreclosure by advertisement, because it would allow for double recovery on the same debt.

The facts of *Leslie* are similar to this case in that *Leslie* involved a mortgage foreclosure and a personal guaranty. In *Leslie*, the United States government commenced an action against the defendants-guarantors of a promissory note after the mortgagor corporation defaulted on its payments under the note. *Id.* at 764. After the government sought to enforce the guaranty contracts, the government filed a separate action for foreclosure by advertisement. *Id.* at 764-765. At trial, the guarantors argued that the applicable Michigan statute prohibited simultaneous actions for both foreclosure and enforcement of the guaranty contracts. *Id.* at 765.

The *Leslie* court held that the government was permitted to maintain both actions. *Id.* at 766. The court explained that the statute was intended to prevent the mortgagor from losing the mortgaged property and being held personally liable for the debt. *Id*. *Leslie* further explained that the statute was intended to protect the mortgagor, not the guarantors of a note. *Id*. The court concluded:

> In the case before us, the debtor-mortgagor is [the corporation], not the defendants individually. No action was maintained against [the corporation] on the debt. The

> action in the District Court was brought against the defendants in their capacity as guarantors. The guaranty is an obligation separate from the mortgage note. It is simply not the "debt" to which the statute refers. [*Id.* at 766.]

On appeal, plaintiff argues that this case is distinguishable from *Leslie* and its progeny because the mortgage specifically defines the "indebtedness" as including the guaranties. Accordingly, plaintiff argues, the mortgage itself includes the guaranties in the mortgage debt, distinguishing this case from *Leslie* because the mortgage and the guaranties are not separate. Further, plaintiff maintains, because the mortgage specifically defines its indebtedness to include the guaranties, the action against the guarantors constituted an action "to recover the debt secured by the mortgage" pursuant to § 3204(1)(b), thereby rendering the foreclosure by advertisement invalid.[3]

The mortgage in this case provides that it is "given to secure" payment of the "indebtedness." The mortgage further defines "indebtedness" to mean "all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents . . . ." "Related Documents" is defined to mean "all promissory notes, credit agreements, loan agreements, environmental agreements, *guaranties*, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and

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[3] Defendant argues on appeal that this specific argument is not preserved; however, we note that while plaintiff did not present the identical argument in the trial court, the central issue there was the same as the central issue here: whether the guaranties are part of the "debt secured by the mortgage." Nevertheless, even if plaintiff's argument were unpreserved, we would address the argument because it involves a question of law for which the record before us contains all the facts necessary for resolution. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 118; 724 NW2d 485 (2006).

documents, whether now or hereafter existing, executed in connection with the Indebtedness" (emphasis added).

The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). We must enforce the clear and unambiguous language of a contract as it is written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

We agree with plaintiff that the plain language of the mortgage contract specifically includes guaranties in the indebtedness secured by the mortgage. This fact distinguishes the instant case from the case in *Leslie* because in holding that simultaneous actions to collect from the guarantors and to foreclose on the mortgage did not violate the precursor to MCL 600.3204, the court in *Leslie* specifically noted that "[t]he action in the District Court was brought against the defendants in their capacity as guarantors. The guaranty is an obligation separate from the mortgage note." *Leslie*, 421 F2d at 766. In this case the guaranties are included in the mortgage debt by the terms of the mortgage agreement, and accordingly are not obligations that are separate from the mortgage note. The parties do not cite any case that considered MCL 600.3204 under circumstances where the guaranties were incorporated into the mortgage debt, and we could find no such case. The statute does not define "the debt secured by the mortgage," and logically, "the debt secured by the mortgage" must be defined by the mortgage itself.

On the basis of the plain language of the mortgage and the plain language of the statute, we conclude that the trial court erred by granting summary disposition

to defendant. In this case, the action that was instituted against the guarantors constituted an action to recover the debt secured by the mortgage because the mortgage specifically included the guaranties as part of the debt secured by the mortgage.[4] Consequently, defendant's foreclosure by advertisement was invalid pursuant to the one-action rule, which provides that a foreclosure by advertisement is permitted only if "[a]n action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage . . . ." MCL 600.3204(1)(b).

Reversed.

HOEKSTRA, P.J., and SAWYER and SAAD, JJ., concurred.

[4] We note that the mortgage uses the term "indebtedness," while the statute uses the term "debt" in § 3204(1)(b). We find that this slight distinction in the terms used does not change the analysis in this case because the terms are used to refer to the same thing. This Court should interpret the words in a contract according to their ordinary meaning, and a dictionary may be used to determine the ordinary meaning of a word or a phrase. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515-516; 773 NW2d 758 (2009). "Indebtedness" is defined to mean the state of being "obligated to repay money" and as "something owed;" and "debt" is defined to mean "something that is owed or that one is bound to pay to or perform for another; a liability or obligation to pay or render something." *Random House Webster's College Dictionary* (1992). It is plain that the terms are synonymous as used in the mortgage and the statute. This point is further supported by the fact that the statute, in § 3204(1)(d), states that "[t]he party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." The statute clearly uses the term's usage of the term "indebtedness" synonymously with "debt."

PEOPLE v GOREE

Docket No. 302046. Submitted April 10, 2012, at Detroit. Decided April 19, 2012, at 9:00 a.m.

Nathaniel Goree was charged in the Wayne Circuit Court with assault with intent to commit murder, assault with intent to do great bodily harm less than murder, and possession of a firearm during the commission of a felony. A jury acquitted him with regard to the assault charges, but convicted him of the felony-firearm charge. Defendant appealed, alleging that the court, Thomas E. Jackson, J., erred by instructing the jury that a felony-firearm offense cannot be justified by self-defense.

The Court of Appeals *held*:

The trial court erred by instructing the jury that self-defense is not applicable to a felony-firearm charge. Defendant presented evidence from which the jury apparently found that defendant acted in self-defense. Defendant introduced evidence from which the jury could conclude that defendant's alleged criminal possession of a firearm was justified because he honestly and reasonably believed that his life was in imminent danger and that it was necessary for him to exercise force to protect himself. The trial court's erroneous jury instruction was prejudicial. Defendant is entitled to a new trial on the felony-firearm charge. His conviction is vacated and the matter is remanded for further proceedings.

Vacated and remanded.

CRIMINAL LAW — SELF-DEFENSE — FELONY-FIREARM.

The defense of self-defense is available to a defendant charged with possession of a firearm during the commission of a felony (MCL 750.227b; MCL 780.972).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Julie A. Powell*, Assistant Prosecuting Attorney, for the people.

Nathaniel Goree *in propria persona*.

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM. A jury convicted defendant, Nathaniel Goree, of possession of a firearm during the commission of a felony (felony-firearm) in violation of MCL 750.227b, but acquitted him of any underlying assault charge. The jury reached its verdict after the trial court erroneously reinstructed it that a felony-firearm offense cannot be justified by self-defense. A defendant's commission of a violent crime may be excused when the defendant acts to protect himself or others, as may a firearm-possession charge. We therefore vacate defendant's felony-firearm conviction and sentence, and remand for a new trial before a properly instructed jury.

I. BACKGROUND

Defendant and his wife, Edna Goree, live next door to the Buckner family on Elmdale Street in the city of Detroit. In 2009, the families began to feud over the placement of a privacy fence. Then, on March 16, 2010, 13-year-old Breanna Buckner and defendant's grandchildren had a disagreement. Edna and her 34-year-old daughter each allegedly slapped Breanna on the face. The police were summoned and the prosecutor filed assault and battery charges against Edna and her daughter.[1]

After the March 2010 incident, the animosity between the families escalated. At approximately 7:00 p.m. on August 1, 2010, the Buckner family returned home after a day out together. Donald Buckner testified

[1] According to the record, the Gorees' assault and battery trial was scheduled for November 16, 2010. There is no record indication regarding the outcome of that trial.

that Edna was standing inside her front door, talking on her cell phone and peeking over at them. Donald and his three teenage children got out of the family vehicle. Donald's wife then drove the vehicle past the fence gate and parked it. According to Donald, defendant and Edna came outside and walked to the side of their porch closest to the Buckner home. Donald testified that defendant acted like he was in a trance and repeatedly stated, "Big head bitch, I'm going to kick your ass, I'm tired of this shit." Donald walked down his driveway to a vantage point where he could better see defendant. Donald told defendant, "you nothing but a pussy, you always listening to your wife starting stuff." Donald warned defendant not to come on his property. Donald testified that Edna prodded defendant to shoot him. At that point, defendant reached into his pants, withdrew a handgun, and fired a shot toward Donald's chest. The bullet punctured Donald's arm and hit his rib cage. Donald claimed that defendant and Edna then descended their porch and walked up the Buckners' driveway, and that defendant fired a second shot. Donald and his family escaped into the house and called 911. Donald's wife and three children corroborated the basic elements of his testimony.

Defendant and Edna, on the other hand, claimed that Donald Buckner called Edna "a big head bitch." They testified that Edna tried to leave the house to go to the store, but was stopped when Donald invaded their front porch. Defendant claimed that Donald "looked all wild . . . . Eyes all bulged out his [sic] head, like, he had white all around his lips." Defendant verbally confronted Donald and Donald jumped off the porch. According to defendant and Edna, Donald reached behind his back and threatened, "I have something for you." Defendant was afraid that Donald had a gun. Defendant has a permit to carry a concealed weapon and was

wearing a handgun on his left side. He drew and fired once at Donald. Edna heard Donald yell, "he shot me, he shot me." Defendant and Edna went into the house and called 911.

The responding officers found a single spent shell casing in the flower bed in front of defendant's porch. They found a blood trail on the Buckners' driveway starting about five feet from the gate. The officers found no blood on defendant's property. The officers discovered a neighbor who witnessed part of the incident. He testified that he heard a single gunshot and looked out to see defendant standing on his own property, but near the Buckners' driveway, and heard defendant yell, "I shot him, I shot him, he was on my porch."

The prosecution charged defendant with assault with intent to commit murder, MCL 750.83, and an alternative lesser charge of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant pleaded self-defense and the jury acquitted him of both assault charges. However, the jury convicted defendant of the charged offense of felony-firearm in violation of MCL 750.227b. The court then sentenced defendant to two years' imprisonment.

II. JURY INSTRUCTIONS

Defendant argues that the trial court erroneously instructed the jury that it could not consider self-defense when making its determination on the felony-firearm charge. At the close of defendant's trial, the court instructed the jury as follows with regard to defendant's claim of self-defense:

> In this case the Defendant claims that he acted in lawful self-defense of himself or his wife. A person has the right to use force or even take a life to defend himself or another under certain circumstances. If a person acts in lawful

self-defense, his actions are justified and he is not guilty of the crime. You should consider all the evidence and use the following rules to decide whether the Defendant acted in lawful self-defense. Remember to judge the Defendant's conduct according to how the circumstances appeared to him at the time he acted.

First, at the time he acted the Defendant must have honestly and reasonably believed that he was in danger or another person was being [sic] in danger of being killed or seriously injured. If his belief was honest and reasonable, he could act immediately to defend himself even if it turned out later that he was wrong about how much danger he was in.

In deciding if the Defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the Defendant at the time.

Second, a person may not kill or seriously injure another person to protect himself or another person against what seems like a threat of only minor injury. The Defendant must have been afraid of death or serious physical injury or death or physical injury of another person.

When you decide if the Defendant was afraid of one or more of these, you should consider all the circumstances. The condition of the people involved, including their relative strength, whether the other person was armed with a dangerous weapon or had some other means of injuring the Defendant, and the nature of the other person's attack or threat.

Third, at the time he acted, the Defendant must have honestly and reasonably believed that what he did was immediately necessary. Under the law, a person may only use as much force as he thinks is necessary at the time to protect himself or another person.

A person can use deadly force in self-defense only where it is necessary to do so. If the Defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the Defendant honestly and reasonably believed he needed to use deadly force and self-defense.

> However, a person is never required to retreat an attack in his or her own home, nor if the person reasonably believed that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden fierce and violent attack.
>
> Further, a person is not required to retreat if the person has not or is not engaging in the commission of a crime at the time the deadly force is used; and had a legal right to be where the person is at that time; and has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent death or great bodily harm of the person or another person.
>
> The Defendant does not have to prove that he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that the Defendant did not act in self-defense.
>
> You may consider whether the Defendant had a reason to commit the crimes charged but a reason by itself is not enough to find a person guilty of a crime. The prosecutor does not have to prove that the Defendant had a reason to commit the crimes charged. He only has to show that the Defendant actually committed the crime and that he meant to do so.

The court then proceeded to instruct the jury on the elements of the alternative charged assault offenses. In relation to the felony-firearm charge, the court instructed:

> Now, there is a second count here of possession of a firearm in the commission of a felony.
>
> By the way, the fact of the Defendant having a CCW permit does not preclude a conviction on this charge in and of itself, but you have to prove the elements of the charge here.
>
> The Defendant is also charged with the separate crime of possessing a firearm at the time he committed or attempted to commit the crime of assault with intent to murder or assault with intent to do great bodily harm. To

> prove this charge, the prosecutor must prove the following elements beyond a reasonable doubt:
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> First, that the Defendant committed or attempted to commit the crime of assault with intent to murder, or assault with intent to do great bodily harm, as I have defined those for you. It is not necessary, however, that the Defendant be convicted of that crime, one of those crimes.
>
> Second, at the time the Defendant committed or attempted to commit either of those crimes, he knowingly carried or possessed a firearm.

During deliberations, the jury submitted a note to the court stating, "one, please explain the charged Count Two felony firearm, and, two, does self-defense apply to the felony firearm charge?" The court informed the attorneys that it intended to reread the standard jury instruction and include some information from the "use note and commentary." Of relevance to this appeal, the court stated its intention to "inform them that they have to decide on the underlying offense, but it doesn't have to be a conviction on that, and that when they apply self-defense, they look at it as in terms of the underlying offense in the application. Something to that affect." The court then reinstructed the jury, in relevant part, as follows:

> The Defendant is also charged with the separate crime of possessing a firearm at the time he committed or attempted to commit the crime of assault with intent to murder or assault with intent to do great bodily harm. To prove this charge, that is involving the felony firearm, the prosecution must prove each of the following elements beyond a reasonable doubt:
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> First, that the Defendant committed or attempted to commit the crime of assault with intent to murder or assault with intent to do great bodily harm, as I have defined those for you.

It is not necessary, however, that the Defendant be convicted of that crime or one of those crimes.

Second, at the time the Defendant committed or attempted to commit the crime of assault with intent to murder or assault with intent to do great bodily harm, he knowingly carried or possessed a firearm.

The felony firearm statute prohibits the actual and constructive possession of a firearm at the time that a defendant commits the underlying offense.

Now, so, there is kind of, like, almost your analysis, somewhat of a two-step process here. As a general rule the felony firearm statute is tied to the underlying offense, here the assault charges. And you have to decide if the Defendant committed or attempted to commit that crime. But you can convict the Defendant—in other words, you are not precluded from convicting the Defendant if you find the Defendant not guilty on the other one or if you find him guilty, it can go either way. Because it says that you are—the way the statute is written, it is not necessary that the Defendant be convicted of that crime.

So, in terms of your question, the self-defense might not necessarily apply directly to the firearm, but it is all part of the entire process here, how you look at the case.

So, in other words, one is not charged with felony firearm by itself, so, therefore, *there could not be a self-defense to felony firearm* because that could never be a charge standing alone of felony firearm. So, it is kind of like they are all kind of tied in together.

But, again, you, as the instruction says here, the prosecutor must prove the following elements beyond a reasonable doubt:

First, that Defendant committed or attempted to the [sic] commit the crime of assault with intent to murder or assault with intent to do great bodily harm, as those are defined.

However, the law says that it is not necessary, however, that the Defendant be convicted of that crime of assault with intent to murder or assault with intent to do great

> bodily harm. But at the same time, as part of your analysis in terms of self-defense, I guess in a manner of speaking, is not applied directly to the felony firearm charge, kind of wrapped in with the other charges also.
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> * * *
>
> So, your question was, does self-defense apply to a felony firearm charge? When you look at how you apply the felony firearm, you also have to sort of connect it in with the other one's there making that determination, but you are not precluded from finding the Defendant guilty or not guilty on the felony firearm charge simply and only on what you do with the other charges. [Emphasis added.]

After the court excused the jurors to continue deliberations, defense counsel indicated that he did not "disagree with what you said, but I was requesting that perhaps the jury needed to be reinstructed on self-defense because there [sic] question said does self-defense apply. So, that's what I was asking for." The court responded, "I thought that I said in so many words *that self-defense would not apply* if there was simply a felony firearm charge. Wrap them in together." (Emphasis added.)

We review claims of instructional error de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). "We consider the jury instructions as a whole to determine whether the court omitted an element of the offense, misinformed the jury on the law, or otherwise presented erroneous instructions." *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). "[T]he trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Yet, not all instructional errors warrant relief. We must affirm a

defendant's conviction if the instructions "fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 502.

The trial court erred by instructing the jury that self-defense is not applicable to a felony-firearm charge. Felony-firearm is proscribed by MCL 750.227b(1): "A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony . . . ."

> The felony-firearm statute applies whenever a person carries or has a firearm in his possession when committing or attempting to commit a felony. The evident purpose of the statute is to enhance the penalty for the carrying or possession of firearms during the commission of a felony and thus to deter the use of guns. [*People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004).]

As noted by this Court, "[i]t is possession, not use, of a firearm during the commission of a felony that satisfies the requirements of the statute." *People v Beard*, 171 Mich App 538, 546; 431 NW2d 232 (1988). And as described in *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 391; 280 NW2d 793 (1979):

> The Legislature has clearly expressed its judgment that carrying a firearm during any felony which may, but need not necessarily, involve the carrying of a firearm, entails a distinct social harm inimical to the public health, safety and welfare which deserves separate treatment. In order to deter the use of guns, the Legislature has chosen to create a separate crime.

At its core, felony-firearm is a possessory offense. Our Supreme Court has found self-defense applicable to another possessory offense—being a felon in possession of a firearm in violation of MCL 750.224f. In *People v Dupree*, 486 Mich 693, 696; 788 NW2d 399 (2010), the defendant was a convicted felon who was barred by

statute from possessing a weapon. The defendant wrested a weapon away from an armed assailant during a confrontation at a family party. The defendant then used the weapon to shoot the assailant three times. *Id.* at 698-699. The defendant challenged the assault charges raised against him, asserting that he acted in self-defense. *Id.* at 699. The trial court instructed the jury that the defendant could claim self-defense to the felon-in-possession charge, but told the jury that the defense could apply only if the defendant " 'did not keep the gun in his possession any longer than necessary to defend himself,' " or if the defendant intended " 'to deliver the gun to the police at the earliest possible time.' " *Id.* at 699-700 (emphasis omitted). Similar to the current case, the jury acquitted Dupree of the assault charges but convicted him of being a felon in possession of a firearm. *Id.* at 700.

The Supreme Court determined that the common-law affirmative defense of self-defense was applicable to a felon-in-possession charge without the trial court's gloss requiring a defendant to discard the weapon as soon as possible. *Id.* at 705-706, 711-712. Relying on foreign jurisprudence, the Court noted that felon-in-possession statutes are " 'not intended to affect [a defendant's] right to use a firearm in self-defense' " but were merely intended " 'to prohibit members of the affected classes from arming themselves with firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exists [sic].' " *Id.* at 706, quoting *Harmon v State*, 849 NE2d 726, 734 (Ind App, 2006).

Because the incident underlying *Dupree* occurred before the 2006 enactment of the self-defense act (SDA), MCL 780.971 *et seq.*, the Court applied the common-law

defense. We see no justification to preclude a self-defense instruction merely because the current defendant's defense theory falls under the statute. Pursuant to MCL 780.972, a criminal defendant may raise self-defense as follows:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.
>
> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.
>
> (2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

Here, the trial court properly instructed the jury on the elements of the felony-firearm charge. The court also properly instructed the jury that it need not convict a defendant of an underlying assault charge in order to convict the defendant of the felony-firearm offense. *People v Lewis*, 415 Mich 443, 455; 330 NW2d 16 (1982). The court even correctly described the applicable law of self-defense to the jury. The trial court erred, however, by instructing the jury that "one is not charged with

felony firearm by itself, so, therefore, there could not be a self-defense to felony firearm . . . ."

Just as in *Dupree*, 486 Mich at 708 (quotation marks and citation omitted), our defendant "presented evidence from which a jury could find—and apparently did find—that he acted in self-defense" when he drew his weapon and fired at Donald Buckner. This is shown by the jury's acquittal on the alternate assault charges. Also similar to *Dupree*, *id.*, our defendant "introduced evidence from which a jury could conclude that defendant's criminal possession of the firearm was justified because defendant honestly and reasonably believed that his life was in imminent danger and that it was necessary for him to exercise force to protect himself." The trial court's erroneous instruction that defendant's act of felony-firearm could not be justified by self-defense was prejudicial. "We presume that the jury followed the trial court's instructions." *Id.* at 711. As such, we must presume that the jury followed the court's erroneous instruction not to excuse defendant's felony-firearm offense. Defendant was "entitled to have a properly instructed jury consider the evidence against him," and is therefore entitled to a new trial on the felony-firearm charge. *Id.* at 712 (quotation marks and citation omitted).

Vacated and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

BORRELLO, P.J., and JANSEN and GLEICHER, JJ., concurred.

KELLY SERVICES, INC v DEPARTMENT OF TREASURY

KELLY PROPERTIES, INC v DEPARTMENT OF TREASURY

Docket Nos. 303736 and 303737. Submitted April 3, 2012, at Lansing. Decided April 19, 2012, at 9:05 a.m.

Kelly Services, Inc. and Kelly Properties, Inc., filed separate petitions in the Tax Tribunal, challenging the Department of Treasury's determination that petitioners owed single business taxes for tax years 1997 through 2000 because of their failure to include royalty income derived from the licensing of their trademarks, trade names, and know-how in their sales-factor and gross-receipts calculations. Petitioners developed the trademarks, trade names, and know-how to create a common corporate identity and common business procedures and received the royalty income from licensing agreements between Kelly Properties, Inc., and Kelly Services, Inc., and from licensing agreements between Kelly Services, Inc., and foreign affiliated companies. The hearing referee disagreed with the department's position and recommended that the department's intents to assess be cancelled. The department rejected the recommendation and affirmed the assessments. Petitioners appealed that decision in the tribunal, which consolidated the cases. Petitioners moved for summary disposition pursuant to MCR 2.116(C)(10), which the Tax Tribunal granted, concluding that royalty income did not qualify as sales or lease or rent receipts and was properly excluded from petitioners' sales-factor and gross-receipts calculations. The department appealed.

The Court of Appeals *held*:

1. For purposes of the Single Business Tax Act (SBTA), former MCL 208.1 *et seq*., the term "sales factor" was defined in former MCL 208.51 as a fraction, the numerator of which was the total sales of the taxpayer in Michigan during the tax year and the denominator of which was the total sales of the taxpayer everywhere during the tax year. Under former MCL 208.7(1), as amended by 1982 PA 376, for the relevant tax years, "sales" was defined as the gross receipts arising (1) from a transaction or transactions in which gross receipts constituted consideration for the transfer of title to or possession of property that was (a) stock in trade, (b) other property of a kind that would properly be

included in the inventory of the taxpayer, or (c) property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business; (2) from the performance of services that constituted business activities other than those included in (1); or (3) from any combination of (1) or (2).

2. Royalties do not constitute sales receipts for purposes of former MCL 208.7(1) because they do not arise from a transaction in which the royalty income was consideration for the transfer of possession of property. A royalty is compensation paid to the owner of certain types of property, such as intangible property or natural resources, for the use of that property. Royalty income derives from the transfer of the right to use property, not from the transfer of possession of property. Petitioners' royalty income from licensing trademarks and trade names did not constitute sales receipts for purposes of former MCL 208.7(1) because no transfer of title occurred and the licenses were not granted in consideration for the transfer of possession of the enumerated properties, which remained with petitioners who still owned the intangible property.

3. Because the royalty income clearly derived from the licensing of trademarks and trade names, not from the performance of services, it did not constitute gross receipts under that prong of sales analysis of former MCL 208.7(1).

4. During the relevant tax years, the term gross receipts was defined in former MCL 208.7(3) as the sum of sales and rental or lease receipts. Under the SBTA, income generated from royalties and rents were mutually exclusive categories given their differing natures and treatment. Thus, the royalty income did not constitute a rental or lease receipt. Because the royalty income also did not constitute sales under the SBTA, the Tax Tribunal properly excluded the royalty income from petitioners' gross-receipts and sales-factor calculations.

Affirmed.

1. TAXATION — SINGLE BUSINESS TAX — ROYALTIES.

Royalties do not constitute sales receipts for purposes of the definition of "sales" in MCL 208.7(1) of the former Single Business Tax Act because they do not arise from a transaction in which the royalty income was consideration for the transfer of possession of property; a royalty is compensation paid to the owner of certain types of property, such as intangible property or natural resources, for the use of that property; royalty income derives from the transfer of the right to use property, not from the transfer of possession of property.

2. TAXATION — SINGLE BUSINESS TAX — ROYALTIES — RENTAL OR LEASE RECEIPTS.

Income generated from royalties and rents were mutually exclusive categories for purpose of the former Single Business Tax Act (SBTA) given their differing natures and treatments; royalty income does not constitute rental or lease receipts for purposes of the definitions of "sales" and "gross receipts" in former MCL 208.7(1) and (3) of the SBTA.

Honigman Miller Schwartz & Cohn LLP (by *June Summers Haas* and *Brian T. Quinn*), for Kelly Services, Inc., and Kelly Properties, Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kevin T. Smith*, Assistant Attorney General, for the Department of Treasury.

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. Respondent, the Department of Treasury, appeals as of right an order of the Tax Tribunal that granted summary disposition in favor of petitioners, Kelly Services, Inc., and Kelly Properties, Inc., and denied respondent summary disposition. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioners are an affiliated group of companies. Kelly Services is a Delaware corporation in the business of providing temporary staffing services. Kelly Properties is a Michigan corporation managing the assets used in the business operations of Kelly Services and affiliated companies. Petitioners have developed trademarks, trade names, and the know-how to create a common corporate identity and common business procedures. These are shared by licensure between Kelly Properties and Kelly Services and by licensure between

Kelly Services and foreign affiliated companies. Petitioners receive royalty income from the licensing of these trademarks, trade names, and know-how.

For the tax years 1997 through 2000, petitioners were subject to the Single Business Tax Act (SBTA), former MCL 208.1 *et seq*.[1] To calculate their tax liability under the SBTA, petitioners were required to calculate their "sales factor" and "gross receipts." "Sales factor" was defined, in relevant part, as "a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year." MCL 208.51.[2] MCL 208.7(1),[3] as amended by 1982 PA 376, defined "sales" as follows:

> "Sale" or "sales" means the gross receipts arising from a transaction or transactions in which gross receipts constitute consideration: (a) for the transfer of title to, or possession of, property that is stock in trade or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, or (b) for the performance of services, which constitute business activities other than those included in (a), or from any combination of (a) or (b).

MCL 208.7(3), defined "gross receipts," in relevant part, as the "sum of sales" and "rental or lease receipts." For the tax years at issue, petitioners excluded

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[1] Repealed by 2006 PA 325, effective for tax years beginning after December 31, 2007. Throughout this opinion, we will refer to the provisions of the SBTA in effect at the relevant times by MCL number without designating them as former provisions.

[2] MCL 208.51 was amended by 1999 PA 115, and the quoted language became MCL 208.51(1).

[3] All references to MCL 208.7 are to that provision as amended by 1982 PA 376.

the royalty income generated from the licensing of trademarks, trade names, and know-how from their total sales and gross-receipts calculations.

Respondent audited petitioners and issued Kelly Services a bill of taxes due in the amount of $290,675, plus interest in the amount of $68,681.05, alleging that the royalty income should have been included in their sales-factor and gross-receipts calculations. Respondent also issued Kelly Properties a bill of taxes due in the amount of $49,727, plus interest in the amount of $21,966.80, alleging that the royalty income should also have been included in their calculation of gross receipts.

After the conclusion of the informal conference in respondent's hearings division, the hearing referee concluded that respondent's position with regard to petitioners' royalty income was incorrect and that the intents to assess issued by respondent should be cancelled. Respondent rejected the hearing referee's recommendation and affirmed the original assessments. Petitioners appealed in the Tax Tribunal, and their actions were consolidated.

In the Tax Tribunal, petitioners moved for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact), and respondent filed a motion pursuant to MCR 2.116(I)(2) (judgment for opposing party). The Tax Tribunal granted summary disposition to petitioners, concluding that royalty income does not qualify as sales or lease or rent receipts and therefore should not be included in the calculation of a taxpayer's sales factor or gross receipts.

Respondent moved for reconsideration, citing a conflicting tribunal opinion decided after posthearing briefs had been filed in the instant case. The Tax Tribunal denied the motion, and respondent now appeals as of right.

II. STANDARD OF REVIEW

Absent an allegation of fraud, this Court reviews a Tax Tribunal decision for misapplication of the law or adoption of a wrong legal principle. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). "But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo." *Id.* While agency interpretations of statutes are entitled to respectful consideration and should not be overruled without cogent reasons, they are not binding on this Court and cannot conflict with the Legislature's intent as expressed in the language of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103, 108-109; 754 NW2d 259 (2008). The overriding goal of statutory interpretation is the determination of legislative intent and the implementation of that intent once discerned. *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 8; 818 NW2d 337 (2011). When tax statutes are construed, any ambiguities are resolved in favor of the taxpayer. *Int'l Business Machines v Dep't of Treasury*, 220 Mich App 83; 86; 558 NW2d 456 (1996).

III. ANALYSIS

Respondent argues that the Tax Tribunal erred as a matter of law when it concluded that royalty income from the licensing of trademarks and trade names were not included in sales and gross receipts under the SBTA before 2001. We disagree.

In *PM One Ltd v Dep't of Treasury*, 240 Mich App 255, 261-262; 611 NW2d 318 (2000), this Court held that the proper way to analyze what constitutes a "sale" is as follows:

> (1) "gross receipts"

(2) arising from a "transaction" in which gross receipts constitute "consideration" for one of the following described in (a), (b), or (c):

(a) transfer of title to, or possession of, property that is

(i) stock in trade; or

(ii) other property of a kind that would be properly included in the inventory of the taxpayer; or

(iii) property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business;

(b) "performance" of "services," that constitute "business activities" other than those listed in (a);

(c) any combination of (a) or (b).

In this case, it is undisputed that the royalty income in question derived from the licensing of trademarks and trade names and not the performance of services. As such, (2)(b) and (c) in the *PM One* analysis are irrelevant. After the exclusion of those factors, resolution of the instant case requires this Court to resolve three questions. First, whether the royalty income in question constituted gross receipts; second, whether the royalty income arose from the transfer of title or possession; and third, whether the trademarks and trade names in this case constituted applicable forms of property under the SBTA. These three questions will be analyzed in turn.

A. GROSS RECEIPTS

As previously discussed, under MCL 208.7(3), gross receipts were calculated by adding together sales and rental or lease receipts. Because what constitutes gross receipts relies on the meaning of sales, and the definition of "sales" relies on the definition of "gross receipts," this Court has noted that the definitions are "somewhat circular" and that resolution of the sales

prong of gross receipts requires analyzing the remaining elements of a sale under the SBTA. See *PM One*, 240 Mich App at 261-262. As such, the sales portion of this gross-receipts analysis will be undertaken later in this opinion.

The second prong of the gross-receipts calculation is rental or lease receipts. In the past, this Court has distinguished between royalties and rent for SBTA purposes and indicated that the two categories were mutually exclusive given their differing natures and treatment under the SBTA. *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 675-677; 649 NW2d 760 (2002); *Field Enterprises v Dep't of Treasury*, 184 Mich App 151, 157-159; 457 NW2d 113 (1990). Therefore, because the royalty income derived from licensing agreements did not constitute rental or lease receipts, whether or not royalty income constituted gross receipts under the SBTA depends on the conclusion of the sales analysis below.

B. TRANSFER OF TITLE OR POSSESSION

In order to be properly classified as sales receipts under the SBTA during the years at issue, royalty income must have arisen from a transaction in which the royalty income was consideration for the transfer of title to, or possession of, property. MCL 208.7(1)(a) and (b). Therefore, if no transfer of title or possession was involved in the transaction giving rise to the royalty income, then no further analysis is needed and the royalty income cannot be classified as sales receipts. There is no dispute that no transfer of title occurred in this case, so the only question here is whether or not the royalties arose from the transfer of possession of property.

While the term "royalties" was not defined under the SBTA, it was defined by our Supreme Court in *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 475; 373 NW2d 730 (1985), a case involving "the taxation of oil and gas royalties under Michigan's Single Business Tax Act . . . ." The *Mobil Oil* Court looked to the definition of "royalty" in both *The Random House College Dictionary* (rev ed) and Black's Law Dictionary (5th ed) and determined that "the common understanding of royalties" is that they are compensation paid to the owner of certain types of property, such as intangible property or natural resources, for the use of that property. *Id*. at 484-485. Under this common definition, then, royalty income derives from the transfer of *the right to use property*, not from the transfer of *possession of property*. Moreover, petitioners' ownership of the intangible property in this case was not transferred to the licensee, but remained with the licensor. As such, royalty income does not appear to have arisen out of a qualifying transaction.

Respondent, however, challenges this understanding of royalty transactions, citing *SBC Teleholdings, Inc v Dep't of Treasury*, 17 MTTR 645 (Docket No 320440, March 17, 2010), a conflicting Tax Tribunal case decided after posthearing briefs had been filed in the instant case. In *SBC Teleholdings*, the tribunal concluded that "acquisition and use of the name and marks constitutes 'possession' of the intangibles . . . . " *Id*. at 4. As a result, the retention of title by a licensor of intangible property does not preclude the licensor from transferring possession of the intangible property to another. *Id*. at 5.

This interpretation, however, is at odds with the common understanding of possession. When a term is undefined, a court may establish its meaning through a

dictionary definition. *Citizens Ins Co v Pro–Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). Black's Law Dictionary (9th ed) defines "possession" as "[t]he fact of having or holding property in one's power; . . . [t]he right under which one may exercise control over something to the exclusion of all others; . . . [or] [s]omething that a person owns or control[s]." While the licensees in the instant case have the right to use the intangible property licensed to them, they do not own or control that intangible property; ownership and control remain with petitioners. See *Detroit Lions, Inc v Dep't of Treasury*, 157 Mich App 207, 214-219; 403 NW2d 812 (1986). Given the fact that royalty payments are made for the use of a right, the fact that the licensor retains ownership and control of the intangible property that is generating the royalty payments, and this Court's instruction that transfers of possession involve the transfer of absolute ownership, it is clear that royalty income does not arise from a transaction involving the transfer of possession of property. As such, it was rightly excluded from calculation of the sales factor and the gross receipts for the tax years at issue.

C. APPLICABLE FORMS OF PROPERTY

However, even if this Court deems that royalty income arises from the transfer of possession of property, the requirements for a sale are still not met unless the property is of a type identified under the SBTA. The first of these types of applicable property is "stock in trade," a term that was undefined in the SBTA. MCL 208.7(1)(a). Black's Law Dictionary (9th ed) defines "stock in trade" as follows:

> 1. The inventory carried by a retail business for sale in the ordinary course of business. 2. The tools and equipment

> owned and used by a person engaged in a trade. 3. The equipment and other items needed to run a business.

The property in question in this case, trademarks and trade names, cannot be considered inventory, tools, or equipment.

The second form of applicable property is "property of a kind which would properly be included in the inventory of the taxpayer . . . ." MCL 208.7(1)(a). In this case, petitioners presented evidence in the form of an affidavit stating that the intangible property at issue was not included in petitioners' inventory, and respondent did not submit evidence challenging this accounting decision.

The third and final form of applicable property is "property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business . . . ." MCL 208.7(1)(a). In this case, it is undisputed that the intangible property at issue was licensed only to affiliated parties, not "customers" or other unaffiliated third parties. Moreover, the intangible property at issue in this case was developed, held, and licensed for the purposes of establishing a common corporate identity and common business procedures amongst affiliated entities.

Therefore, because the royalty income in this case did not arise from the transfer of possession of an enumerated type of property, it did not constitute sales receipts under the SBTA for the tax years at issue. Further, because royalty income does not constitute sales or rental or lease receipts, it also does not constitute gross receipts under the SBTA for the tax years at issue. As such, the Tax Tribunal did not err by concluding that royalty income should not be included in petitioners' sales-factor and gross-receipts calculations for the tax years at issue.

Respondent also argues that because the SBTA definition of "sales" was amended to exclude royalties in the tax years beginning after December 31, 2000,[4] and because that amendment took effect prospectively, the Legislature did not intend royalties to be excluded before the enactment of that amendment. Respondent recognizes that statutory amendments can be "intended to clarify the meaning of a provision rather than change it," but argues that "[i]t would be illogical for the Legislature to adopt language intended to clarify the previous language and make the clarification prospective only." This argument is without merit. There is nothing inherently inconsistent between clarifying a statute's meaning and making an amendment prospective. Indeed, when no appellate court has rendered a decision contrary to the amended language, this would seem to be an obvious legislative procedure.

Moreover, the legislative bill analysis clearly indicates the clarifying nature of the amendment of the definition of sales in the SBTA. Although our Supreme Court has eschewed reliance on bill analyses to determine legislative intent, *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001), legislative bill analyses do have probative value in certain, limited circumstances, *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007). Here, we find some persuasive value in considering the following in connection with 2000 PA 477:

> [R]epresentatives of the treasury department and the business sector have been working for several months to provide a clearer, less circular definition of the term "gross receipts" in the SBT act and to alter the act to make it conform to a recent Michigan Court of Appeals decision,

[4] See MCL 208.7(1)(b), as amended by 2000 PA 477.

PM One, Limited v Department of Treasury. [House Legislative Analysis, SB 1300, November 29, 2000, p 1.]

In light of our analysis in *PM One* and the language of the statute, we reject respondent's contention that the amendment only took effect prospectively.

Affirmed.

FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ., concurred.

GRANGE INSURANCE COMPANY OF MICHIGAN v LAWRENCE

Docket No. 303031. Submitted April 13, 2012, at Grand Rapids. Decided April 24, 2012, at 9:00 a.m. Leave to appeal granted, 493 Mich 851.

Grange Insurance Company of Michigan brought an action in the Muskegon Circuit Court seeking a declaratory judgment regarding, in part, its duty under a no-fault insurance policy issued to Edward Lawrence to reimburse Farm Bureau General Insurance Company of Michigan for first-party personal protection insurance benefits it paid following the death of Josalyn Lawrence, a minor, as a result of an automobile accident. The accident occurred while Josalyn's mother, Laura Rosinski, was driving a vehicle insured by Farm Bureau. Edward Lawrence, Josalyn's father, and Rosinski were divorced at the time of the accident and shared joint legal custody of the child, although Rosinski had primary physical custody. Grange Insurance had denied Farm Bureau's request for reimbursement on the basis of the definition of "family member" in its policy, which provided that if "a court has adjudicated that one parent is the custodial parent, that adjudication shall be conclusive with respect to the minor child's principal residence." Grange Insurance thus claimed that Josalyn was not "domiciled in the same household" as Edward Lawrence. The court, Timothy G. Hicks, J., determined that the evidence showed that the child resided with both parents and granted summary disposition in favor of Farm Bureau, ordering Grange Insurance to reimburse Farm Bureau 50 percent of the amount of the benefits it had paid. Grange Insurance appealed.

The Court of Appeals *held*:

1. The terms "domicile" and "residence" are legally synonymous for purposes of the no-fault act.

2. The phrase "domiciled in the same household" in MCL 500.3114(1) does not have a fixed meaning and its meaning varies with the circumstances.

3. The undisputed circumstances of this case established that Josalyn was domiciled in the homes of each of her parents. The issue of domicile was properly determined as a question of law by the trial court because the undisputed evidence showed that

Josalyn resided with both her parents. The trial court did not err by granting summary disposition in favor of Farm Bureau.

4. Because the disputed provision in Grange Insurance's policy would limit its obligation where the no-fault act does not, the provision is invalid.

Affirmed.

1. INSURANCE — NO-FAULT — WORDS AND PHRASES — DOMICILE — RESIDENCE.

The terms "domicile" and "residence" are legally synonymous for purposes of the no-fault insurance act (MCL 500.3101 *et seq*.).

2. INSURANCE — NO-FAULT — WORDS AND PHRASES — DOMICILED IN THE SAME HOUSEHOLD.

Factors to consider in determining if a person is "domiciled in the same household" as the named insured include (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite time, in the place the person contends is the person's domicile or household, (2) the formality of the relationship between the person and the members of the household, (3) whether the place where the person lives is in the same house, the same curtilage, or upon the same premises as the insured, and (4) whether the person has another place of lodging; additional factors for determining if a minor child is domiciled with the child's parents include whether the child continues to use the parent's home as the child's mailing address, maintains some possessions there, uses the parent's address on the child's driver's license or other documents, and whether a room is maintained for the child at the parents' home and the child is dependent upon the parents for support (MCL 500.3114[1]).

3. INSURANCE — NO-FAULT — WORDS AND PHRASES — DOMICILED IN THE SAME HOUSEHOLD.

The phrase "domiciled in the same household" in MCL 500.3114(1) of the no-fault insurance act does not have a fixed meaning; its meaning may vary with the circumstances; the phrase does not limit the minor child of divorced parents to one domicile and does not define a "domicile" as a "principal residence" (MCL 500.3114[1]).

Bremer & Nelson LLP (by *Ann M. Byrne*) for Grange Insurance Company of Michigan.

Bleakley, Cypher, Parent, Warren & Quinn, P.C. (by *Michael D. Ward*), for Farm Bureau General Insurance Company of Michigan.

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM. In this case, involving personal protection insurance benefits under the Michigan no-fault act, MCL 500.3101 *et seq*., plaintiff, Grange Insurance Company of Michigan, appeals as of right the order regarding motions for summary disposition. We affirm.

On September 24, 2009, Laura Rosinski was driving with her minor child, Josalyn Lawrence, in a vehicle insured by Farm Bureau General Insurance Company of Michigan. They were in a motor vehicle accident that resulted in the death of Josalyn. At the time of the accident, Josalyn's parents, Edward Lawrence and Rosinski, were divorced. Pursuant to the judgment of divorce, the parents shared joint legal custody but Rosinski had primary physical custody. Although Josalyn slept at Rosinski's home during the week, Edward saw Josalyn almost every day. Josalyn had a room and personal belongings at Edward's home, although her pets were at Rosinski's home. Josalyn usually stayed with Edward every other weekend, but Edward and Rosinski were flexible with their parenting agreement. There was no intention of changing this parenting-time arrangement. Edward also took Josalyn on vacations in the summer. The small amount of mail Josalyn received went to Rosinski's home. Rosinski's address was usually listed as Josalyn's home address.

At the time of the accident, Edward was a named insured on an automobile policy, which included personal protection insurance, with plaintiff. Rosinski was the named insured on an automobile policy, which included personal protection insurance, with defendant Farm Bureau. Farm Bureau paid first-party benefits on behalf of Josalyn and claimed plaintiff was equal in

priority and should pay a portion of the benefits. Plaintiff denied Farm Bureau's request for reimbursement. Plaintiff's policy included a provision within the definition of "[f]amily member," stating that "[i]f a court has adjudicated that one parent is the custodial parent, that adjudication shall be conclusive with respect to the minor child's principal residence."

The instant lawsuit was initiated when plaintiff filed a complaint for declaratory relief, seeking an adjudication of whether Josalyn was an "insured" under its policy for purposes of the Michigan no-fault act, MCL 500.3101 *et seq*.

The trial court granted summary disposition in favor of Farm Bureau and determined that plaintiff was liable for 50 percent of the first-party benefits paid by Farm Bureau. On appeal, plaintiff argues that the trial court erred because no Michigan law recognizes dual domiciles for a minor child of divorced parents for purposes of the no-fault act and the trial court incorrectly applied the facts to the law. We disagree.

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008) (citation omitted). Summary disposition pursuant to MCR 2.116(C)(10) is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. Questions of statutory interpretation are questions of law that are reviewed de novo. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 493; 791 NW2d 853 (2010) (citation omitted). "[W]here contract language is neither ambiguous, nor contrary to the no-fault statute, the will of the parties, as reflected in their agreement, is to be carried out, and thus the contract is enforced as written." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich

588, 594; 648 NW2d 591 (2002) (citations omitted). The no-fault act is remedial and should be construed in favor of those it is intended to benefit. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995) (citation omitted).

MCL 500.3114(1) provides that a personal protection insurance policy applies to the named insured, the insured's spouse, "and a relative of either domiciled in the same household . . . ." The Michigan Supreme Court has considered the phrase "domiciled in the same household" and determined that for purposes of the no-fault act, the terms "domicile" and "residence" are "legally synonymous." *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 495; 274 NW2d 373 (1979). To determine if someone is "domiciled in the same household" as an insured, the *Workman* decision articulated four factors to be considered:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; (4) the existence of another place of lodging by the person alleging "residence" or domicile" in the household. [*Id*. at 496-497 (citations omitted).]

Additional factors helpful when determining if a minor child is domiciled with the child's parents were articulated in *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 682; 333 NW2d 322 (1983):

> Other relevant indicia of domicile include such factors as whether the claimant continues to use his parents' home as his mailing address, whether he maintains some possessions with his parents, whether he uses his parents' address on his driver's license or other documents, whether

> a room is maintained for the claimant at the parents' home, and whether the claimant is dependent upon the parents for support.

There is nothing in MCL 500.3114(1) or *Workman* or *Dairyland* that limits a minor child of divorced parents to one domicile or defines domicile as a "principal residence." The *Workman* decision recognized that "domiciled in the same household," does not have a fixed meaning and may vary with the circumstances. *Workman*, 404 Mich at 495. The undisputed circumstances in the instant case establish that Josalyn was domiciled, meaning had a residence, in the homes of each of her parents. With regard to the *Workman* factors: (1) there was no evidence of an intention to change the parenting arrangement; (2) the same formal relationship existed between Josalyn and her two parents; (3) at both homes, Josalyn lived in the house; and (4) as to both homes, Josalyn had another place at which she stayed. With regard to the *Dairyland* factors: (1) what little mail Josalyn received came to Rosinski's home, (2) Josalyn had possessions at both homes, (3) Josalyn primarily used Rosinski's address, (4) Josalyn had a room at both homes, and (5) Josalyn was dependent on both parents for support.

The undisputed evidence clearly shows that Josalyn resided with both parents and, as such, the issue of domicile was properly determined as a question of law by the trial court. *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362, 364; 656 NW2d 856 (2002). Although the judgment of divorce awarded Rosinski primary physical custody, that order does not change the fact that the evidence showed that Josalyn actually resided with both her parents, which is the relevant inquiry under the no-fault act. There remained no issue of material fact and the trial court did not err when it granted

summary disposition in favor of Farm Bureau on the issue of reimbursement. *Latham*, 480 Mich at 111.

Additionally, plaintiff argues that its policy provision, stating that a court's adjudication of custody is conclusive of a child's principal residence, should control. However, MCL 500.3114(1) does not impose a requirement that coverage extends only to a relative whose "principal residence" is with the insured. "To the degree that the contract is in conflict with the statute [the no-fault act], it is contrary to public policy and, therefore, invalid." *Cruz*, 466 Mich at 601. In this case, because plaintiff's policy would limit plaintiff's obligation where the no-fault act does not, that provision is invalid.

Affirmed.

BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ., concurred.

PEOPLE v EISEN

Docket No. 304577. Submitted April 12, 2012, at Grand Rapids. Decided April 24, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 918.

Jeffrey C. Eisen was convicted following a jury trial in the Ottawa Circuit Court, Jon H. Hulsing, J., of three counts of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct. He was acquitted with regard to a fourth count of first-degree criminal sexual conduct. Defendant appealed.

The Court of Appeals *held*:

1. Defendant failed to overcome the presumption that his trial counsel provided effective assistance when, following his counsel's stipulation that the seminal fluid found in the victim's home, which the victim and her mother shared with defendant and his daughter, contained defendant's DNA, defendant's counsel did not object to the lack of statistical testimony regarding the likelihood that someone from the general population would also match the DNA profile.

2. The trial court erred by failing to tell the jury during its oral jury instructions with regard to three of the counts of first-degree criminal sexual conduct that an element of the crime required a finding that the victim had been younger than 13 years old at the time of the charged conduct. Defendant's trial counsel should have objected to the instructions and his counsel's performance fell below an objective standard of reasonableness. However, the verdict form did reflect the requirement that the victim must have been younger than 13 at the time. A verdict form is treated as part of the package of jury instructions. The prejudicial effect of the error was significantly reduced by the presence of the proper elements on the verdict form. The Court of Appeals will not reverse when, as here, the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights.

3. There was sufficient evidence to support defendant's convictions.

4. Defendant's conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b), required a finding that defendant engaged in sexual penetration with the victim and that force or

coercion was used to accomplish the penetration. Force or coercion exists whenever a defendant's conduct induces a victim to reasonably believe that the victim has no practical choice to resist such penetration. A history of using force to commit sexual abuse of the victim by the defendant while the victim was a child, as in this case, or some other similarly valid reason supported by the evidence, may be sufficient for a rational trier of fact to find that the defendant forced or compelled the victim to participate in sexual intercourse with the defendant.

Affirmed.

1. TRIAL — JURY INSTRUCTIONS — VERDICT FORMS.

The verdict form is treated as a part of the jury instructions.

2. APPEAL AND ERROR — JURY INSTRUCTIONS.

The Court of Appeals reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal; reversal is not required where the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.

3. CRIMINAL LAW — THIRD-DEGREE CRIMINAL SEXUAL CONDUCT — FORCE OR COERCION.

The determination whether a defendant charged with third-degree criminal sexual conduct used force or coercion to accomplish sexual penetration is to be made in light of all the circumstances; the evidentiary facts must not be considered in isolation, but must be considered in conjunction with one another in a light most favorable to the prosecution; force or coercion exists whenever a defendant's conduct induced a victim to reasonably believe that the victim had no practical choice but to participate in sexual intercourse with the defendant (MCL 750.520d[1][b]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Assistant Prosecuting Attorney, for the people.

Frank Stanley for defendant.

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant appeals as of right his convictions on three counts of first-degree criminal sexual conduct, MCL 750.520b(1), and one count of third-degree criminal sexual conduct, MCL 750.520d(1)(b). Defendant was acquitted of a fourth count of first-degree criminal sexual conduct. Defendant was sentenced to 210 to 540 months' imprisonment for each conviction of first-degree criminal sexual conduct and 120 to 180 months' imprisonment for the conviction of third-degree criminal sexual conduct. We affirm.

This case stems from defendant's repeatedly sexually assaulting the victim over a period of years. The victim was born on November 10, 1993. She has some form of learning disability: she testified that she has a "hard time comprehending things" and needed to take special classes in school. In 2005, when the victim was 11 years old and sometime before she started the sixth grade, the victim and her mother moved into the trailer park in which defendant and his daughter were already living. Sometime shortly after the victim moved there, she met defendant's daughter and the two became friends. The victim met defendant through his daughter. The victim's mother and defendant eventually entered into a dating relationship, and all four people moved into the same trailer together.

Defendant first argues that when the prosecution's DNA expert testified that seminal fluid found in various areas of the victim's home matched defendant, the expert should have provided statistical testimony explaining the likelihood that someone from the general population would also match the DNA profile. However, defendant's trial counsel stipulated that the seminal fluid found at the scene contained defendant's DNA. A stipulation constitutes a waiver of any alleged error, so

there is no error for us to review. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, we decline to do so. Similarly, defendant's contention that his trial counsel should have objected to the lack of a statistical assessment of the DNA match is without merit. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Defendant does not explain to us why, in light of counsel's stipulation regarding the match itself, counsel would have had any sound basis for objecting to the lack of any statistics concerning that match. Nor does defendant explain why stipulating with regard to the match was an unsound strategic decision, irrespective of its efficacy.[1] "Counsel is not required to raise meritless or futile objections . . . ." *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Defendant has failed to overcome the presumption that his counsel was effective.

Defendant next argues that he was denied due process when an element of three of the first-degree criminal sexual conduct charges was omitted in the final jury instructions. Defendant also claims that his trial counsel was ineffective by failing to object to the defective instructions. Defendant waived the jury instruction issue itself because trial counsel expressly approved the jury instructions and stated that he had "no objection." See *People v Kowalski*, 489 Mich 488, 503-504; 803 NW2d 200 (2011). However, we review

[1] By the time the victim found someone she trusted sufficiently and to whom she felt safe disclosing defendant's abuse, defendant and her mother were not only living together, they were engaged. Defense counsel focused on the assertion that defendant's semen was found throughout the residence because defendant and the victim's mother had sexual relations "all over the place" in the trailer. We do not believe this to have been an unsound strategy.

this alleged error because it is necessary to resolve defendant's claim of ineffective assistance of counsel. We note that this instructional issue would also apply to the charge for which defendant was acquitted.

We first conclude that the jury instructions were indeed plainly erroneous. The relevant charges of first-degree criminal sexual conduct required that: (1) penetration occurred with another person, and (2) the other person was "under 13 years of age." MCL 750.520b(1)(a). The trial court failed to tell the jury orally that it needed to find that the victim had been younger than 13 years old at the time of the charged conduct. "[A] jury instruction that improperly omits an element of a crime amounts to a constitutional error." *Kowalski*, 489 Mich at 503. We agree that defendant's trial counsel should have objected to the jury instructions and that this conduct fell below an objective standard of reasonableness. See *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

However, the verdict form *did* reflect the requirement that the victim must have been younger than 13 at the time. The verdict form is treated as, essentially, part of the package of jury instructions. See *People v Wade*, 283 Mich App 462, 464-468; 771 NW2d 447 (2009). Challenges to jury instructions are considered "in their entirety to determine whether the trial court committed error requiring reversal." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). While the trial court committed error, the prejudicial effect of that error was significantly reduced by the presence of the proper elements on the verdict form. We will not reverse where the jury "instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). We note that, with

respect to the charges of which defendant was convicted, the evidence was overwhelming that the victim *was* younger than 13 at the time, and this element is not challenged; with respect to the charge of which defendant was acquitted, the victim's testimony was equivocal and uncertain regarding whether she was younger than 13 at the time. It appears to us that the jury's instructions, while imperfect, did in the end sufficiently protect defendant's rights. We decline to reverse on the basis of this error. See *Kowalski*, 489 Mich at 506.

Defendant next argues that there was insufficient evidence to support his convictions. We review "de novo a claim of insufficient evidence . . . ." *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, we "consider whether there was sufficient evidence to justify a rational trier of fact in finding that all the elements of the crime were proved beyond a reasonable doubt." *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010). We review the evidence "in a light most favorable to the prosecution . . . ." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). We "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The gravamen of defendant's argument is that this Court should reweigh the credibility of witnesses. We decline to do so, because it is the role of the jury, not this Court, to determine "the weight of the evidence or the credibility of witnesses." *Id*. We also decline to consider the sufficiency of the evidence supporting defendant's first-degree criminal sexual conduct conviction for anal penetration of the victim, because defendant has provided no specific argument pertaining to that issue,

thereby abandoning it. With regard to defendant's first-degree criminal sexual conduct conviction for an incident on the counter of the bathroom at defendant's residence, defendant only challenges minor details pertaining to the victim's description of her whereabouts *before* the events actually at issue, which might possibly have had some arguable bearing on her credibility to the jury but are totally inconsequential to appellate review. We deem this argument equally meritless.

Defendant's challenge to his final first-degree criminal sexual conduct conviction is premised on the victim's initial uncertainty during her trial testimony regarding how old she was at the time of the charged acts. However, upon further questioning, she recollected that she was either in seventh or eighth grade when the charged acts occurred. Following the clarification of how old she was during these years, the victim confirmed that she was 13 or 14 when the incident occurred.[2] Given that the victim testified that she was either 13 or 14 when the oral penetration occurred, "there was sufficient evidence to justify a rational trier of fact in finding" this element of the crime was "proved beyond a reasonable doubt." *Phelps*, 288 Mich App at 131-132.

Defendant's final conviction was for third-degree criminal sexual conduct, which "requires a showing that the defendant engaged in sexual penetration with another under certain aggravating circumstances, including sexual penetration accomplished by force or coercion." *People v Crippen*, 242 Mich App 278, 282; 617

[2] This particular charge of first-degree criminal sexual conduct required, among other elements, that the victim be "at least 13 but less than 16 years of age . . . ." MCL 750.520b(1)(b)(*i*). Other than his general credibility challenge, defendant does not dispute the other elements of this charge.

NW2d 760 (2000). The required elements are: (1) defendant engaged in sexual penetration with the victim, and (2) "[f]orce or coercion is used to accomplish the sexual penetration." MCL 750.520d(1)(b). Again, other than general credibility challenges, defendant does not contest the evidence that a penetration occurred. Rather, defendant argues that there was no evidence of force or coercion. We disagree.

"The existence of force or coercion is to be determined in light of all the circumstances, and includes, but is not limited to, acts of physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise to overcome the victim." *Crippen*, 242 Mich App at 282-283 (emphasis omitted). MCL 750.520d(1)(b) indicates that "[f]orce or coercion includes but is not limited to any of the circumstances listed in" MCL 750.520b(1)(f)(*i*) to (*v*). These circumstances are:

> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
>
> (*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.
>
> (*v*) When the actor, through concealment or by the element of surprise, is able to overcome the victim. [MCL 750.520b(1)(f)(*i*) to (*v*).]

The incident involving the charge of third-degree criminal sexual conduct was predicated upon sexual conduct that occurred the same day the victim revealed the abuse. The victim asked defendant for a diet root beer and defendant required the victim to perform oral sex on him and allow him to anally penetrate her before she could have the root beer. While the victim did not specifically testify that she was explicitly threatened, she testified that she believed the sexual conduct would "happen whether I [the victim] wanted it or not." This belief must be considered in the context of what was, by that time, a long history of defendant's sexually abusing the victim and making her comply with his sexual demands. We "must consider the evidentiary facts not in isolation, but in conjunction with one another, in a light most favorable to the prosecution." *People v Nowack*, 462 Mich 392, 404; 614 NW2d 78 (2000).

With respect to earlier incidents, the victim had indicated that she had been "scared." During one incident the victim described, defendant asked the victim to get into a bathtub with him. The victim said she only agreed to do so because she was "scared" and she "knew something was going to happen whether I was in there or not." Additionally, defendant's past conduct with the victim included instances of forcible sexual conduct. Given a history of using force, and viewing the evidence in a light most favorable to the prosecution, the jury could reasonably conclude that the victim's statement that the sexual conduct would "happen whether" she "wanted it or not" meant that the victim felt that she was forced to comply. See *People v Kline*, 197 Mich App 165, 167; 494 NW2d 756 (1992). The statute unambiguously provides that the enumerated circumstances are not exhaustive, and indeed, it twice states that "[f]orce or coercion includes, *but is not limited to*" the enumerated circumstances. MCL

750.520d(1)(b), MCL 750.520b(1)(f) (emphasis added). Therefore, we conclude that "force or coercion" exists whenever a defendant's conduct induces a victim to reasonably believe that the victim has no practical choice because of a history of child sexual abuse or for some other similarly valid reason. The evidence was sufficient here for a rational finder of fact to find that defendant forced or coerced the victim to participate in sexual intercourse with him.

Finally, defendant argues that the cumulative effect of the alleged errors warrants reversal, even if the individual errors do not. "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). Because we have found only one error, the omission of one element from the oral jury instructions regarding three of the first-degree criminal sexual conduct charges, there is no error to accumulate in support of a cumulative-error argument. See *id.* at 591 n 12.

Affirmed.

BECKERING, P.J., and OWENS, J., concurred with RONAYNE KRAUSE, J.

EASTBROOK HOMES, INC v DEPARTMENT OF TREASURY

Docket No. 299612. Submitted November 9, 2011, at Lansing. Decided April 24, 2012, at 9:10 a.m. Leave to appeal denied, 493 Mich 882.

The Department of Treasury assessed Eastbrook Homes, Inc., for taxes, penalties, and interest due under the State Real Estate Transfer Tax Act (SRETTA), MCL 207.523 (1)(b), with regard to certain quitclaim deeds on which Eastbrook was the grantor. As part of its business of constructing houses and condominium units for people who had bought a lot or unit from a developer, Eastbrook would enter into a contract with the buyers for constructing the home or condominium unit and, as security for the contract price of the construction, require the buyers to quitclaim their real property to Eastbrook. Once the construction was complete and Eastbrook was paid the contract price, Eastbrook would quitclaim the property back to the buyers. Eastbrook had not paid taxes imposed under the SRETTA that were due when the quitclaim deeds to the buyers were recorded under the belief that the quitclaim deeds were exempt from the tax under MCL 207.526(d) as written instruments given to discharge a security interest. Eastbrook contested the assessments for the tax periods of 2003 through 2006 and requested an informal conference. After the conference, a hearing referee recommended that the assessments be upheld. The Department of Treasury thereafter issued a final decision and order affirming the assessments. Eastbrook appealed in the Tax Tribunal, which granted Eastbrook equitable relief by construing each buyer's quitclaim deed to Eastbrook as only an equitable mortgage and each of the quitclaim deeds from Eastbrook back to the buyers as only a discharge of a security interest exempt from the SRETTA tax under MCL 207.526(d). The Department of Treasury appealed the judgment and order cancelling the assessments.

The Court of Appeals *held*:

1. The Tax Tribunal committed an error of law and relied on the wrong legal principles when it granted Eastbrook equitable relief. The quitclaim deeds given to Eastbrook transferred to Eastbrook all the title and property interests attendant to ownership of the real property that were held by the buyers. The

quitclaim deeds given to the buyers by Eastbrook transferred back to the buyers all the title and property interests that they had previously held. Because the deeds conveyed "any interest in property, for consideration" they were subject to the SRETTA tax imposed by MCL 207.523(1)(b). The deeds given by Eastbrook did more than release its security, they transferred all title and interests in the property back to the buyers and were not exempt under MCL 207.526(d) as a written instrument given to discharge a security interest.

2. Tax exemption statutes are to be strictly construed in favor of the taxing unit. Equity may not be invoked to avoid the dictates of a statute in the absence of fraud, accident, or mistake. Eastbrook's intent to structure the quitclaim transactions as tax-exempt transactions and its belief regarding the import of the transactions are insufficient grounds to grant it equitable relief to reform the deeds so that they fall within the purview of the exemption provided in MCL 207.526(d). There was no fraud, accident, or mistake that prevented the parties from crafting instruments that solely created or discharged a security interest so as to come within the exception provided in MCL 207.526(d). Eastbrook fully intended that the buyers quitclaim all their title and interests to it before it would begin construction and fully intended that all title and interests be transferred back to the buyers following completion of construction and receipt of the contract price. The quitclaim deeds contained no exceptions or reservations.

Reversed.

1. TAXATION — EXEMPTIONS FROM TAXATION — STATUTES — CONSTRUCTION OF STATUTES.

Tax exemption statutes are to be strictly construed in favor of the taxing unit; an exemption cannot be made out by inference or implication but must be found to have been intended by the Legislature beyond a reasonable doubt.

2. EQUITY — STATUTES.

Equity may not be invoked to avoid the dictates of a statute in the absence of fraud, accident, or mistake.

3. DEEDS — QUITCLAIM DEEDS.

A quitclaim deed conveys to the grantee the grantor's complete interest or claim in certain real property unless some interest is expressly excepted or reserved.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *Melissa A. Hagen*), for Eastbrook Homes, Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for the Department of Treasury.

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM. Respondent, the Michigan Department of Treasury (Treasury), appeals by right the July 27, 2010, final judgment of the Michigan Tax Tribunal cancelling Treasury's assessments against Eastbrook Homes, Inc. (petitioner), for taxes, penalties, and interest due under the State Real Estate Transfer Tax Act (SRETTA), MCL 207.521 *et seq*., in the amount of $1,039,854.87 for the tax periods of 2003 through 2006. Petitioner argued in the Tax Tribunal that the real estate transfers at issue were exempt from transfer tax under MCL 207.526(d). After a one-day hearing, briefs, and arguments of the parties, the tribunal issued its final opinion and judgment that MCL 207.526(d) exempted the transfers from taxation and cancelled Treasury's assessments. Because we conclude that the Tax Tribunal erred as a matter of law, we reverse.

I. FACTS AND PROCEEDINGS

Petitioner is a residential building company that constructs and sells new homes. Petitioner builds both speculative and custom-built homes. In the case of a speculative home, petitioner buys a lot or unit from a developer and then builds a house on it with no specific buyer in mind. After the speculative home is complete, petitioner puts the home up for sale on the market. When petitioner sells a speculative home and conveys

the property by deed to the buyer, it pays a transfer tax on the value of the land and the value of the home as required under SRETTA, MCL 207.523.

A custom-built home is a home built for a specific, i.e., predetermined, buyer. In the case of a custom-built home, the buyer purchases the unit or lot from a developer and then hires petitioner to construct a house. In the transactions at dispute in this case, each buyer purchased a lot from developer Eastbrook Development Company, Inc. (EDC). EDC would then convey the property to the buyer by warranty deed, and EDC would pay the transfer tax on the value of the undeveloped property at that the time of the conveyance. At the same time the buyer purchased the unit or lot from EDC, the buyer would also contract with petitioner to construct a house or condominium unit. The purchase agreement between the buyer and EDC includes only the value of the real property without the value of the later construction. Similarly, the contract between the buyer and petitioner includes only the cost of construction, not the value of the underlying real property.

As security for the contract price between petitioner and the buyer, petitioner would require the buyer to quitclaim the property to petitioner. Once construction was complete and petitioner was paid the contract price, petitioner would quitclaim the property back to the buyer. Because the quitclaim deeds were made for the purposes of creating a security interest in the property or discharging a security interest, petitioner contends that the quitclaim deeds were exempt from transfer tax under SRETTA pursuant to MCL 207.526(d). Treasury contends that petitioner acted in a coordinated manner with EDC to sell improved property to its buyers without paying the transfer tax on the improved value of the property. In Treasury's view, the

warranty deeds between EDC and the buyers were unnecessary and were simply being used as a tax-avoidance device. Consequently, Treasury asserts that the quitclaim deeds from petitioner to the buyers are subject to the transfer tax under SRETTA.

Treasury audited petitioner for the years 2003-2006 and, as a result of the audit, assessed petitioner tax deficiencies with interest and penalties totaling $1,039,854.87. Petitioner contested the assessments and requested an informal conference, which was held on May 7, 2008. The hearing referee recommended that the assessments be upheld. Treasury issued a final decision and order of determination affirming the assessments on February 3, 2009. Petitioner appealed the decision in the Tax Tribunal on March 2, 2009, arguing that the quitclaim deeds at issue are exempt from SRETTA because they were made for the purpose of discharging a security interest in the property.

After discovery, a hearing was conducted on April 15, 2000, before a Tax Tribunal hearing officer. At the hearing, the parties stipulated with regard to the admission of four exhibits, which were "typical or prototype documents for all the transactions subject to the various assessments." After the exhibits were admitted, Michael McGraw, Chief Executive Officer of petitioner, testified regarding the transactions. McGraw was the only witness. On the basis of the hearing, the Tax Tribunal made the following findings of fact:

> 1. Petitioner (i.e., the Building Company) is in the business of residential construction.
>
> 2. The Development Company (i.e., Eastbrook Development Company, Inc.) is in the business of taking raw unimproved land and developing it into divisible parcels of property.

3. The Building Company and the Development Company are separate and distinct entities.

4. Mr. McGraw, as an individual owner, has interests in both entities and a legitimate business purpose, other than avoiding transfer tax, to maintain the Building Company and Development Company as separate entities including but not limited to the provisions set forth in the Condominium Act, MCL 559.101 *et seq*., and Land Division Act, MCL 560.101, *et seq*., and tort liability.

5. Pursuant to Paragraph 21 of the Building Contract, Petitioner and the Buyers expressly intended to use the Buyer's quit claim deed for a specified parcel of property, as security for payment of improvements made.

6. During the course of construction, Petitioner has a legitimate business interest to maintain physical possession of the property including but not limited to the lack of a certificate of occupancy (see Paragraph 13 and 14 of the Building Contract), tort liability, and expeditious completion of the project.

7. The parties acted consistent with their intentions set forth in the transaction documents and Building Contract; Petitioner did not act as though he possessed fee simple title in the property and the Buyers still retained an interest in the property by paying the property taxes, and making additional decisions with regard to change orders and addendums made during the course of construction.

8. As expressed in the Building Contract, upon completion of the home Petitioner "would release its security and quit claim title back to the Buyer."

9. The Buyers' quit claim deeds and Petitioner's quit claim deeds both indicate on their face the parties' intention to use the deed as a security; the deeds corroborated the parties intentions set forth in the transaction documents contained in Petitioner's exhibits.

10. The Buyers' quit claim deeds are found to be an effective method of making certain that the Builder is paid in full upon completion of construction of a home, and

provides a strong form of security. [Final Opinion and Judgment (MTT Docket No. 359471, July 27, 2010), pp 14-15.]

The Tax Tribunal invoked the doctrine of equitable mortgages to grant petitioner relief, writing with respect to its conclusions of law as follows:

> The quit claim deeds from Petitioner to its respective customers are clearly deeds or instruments of conveyance of property or any interest in property, which are subject to the tax imposed under the SRETTA, *but for the fact that the quit claim deeds were given as security or an assignment or discharge* [*of*] *the security interest and thus exempt under § 6 of the SRETTA*[.]
>
> It is apparent from clear unambiguous language used within the documents in Petitioner's Exhibits that the parties intended the conveyance of property interests, by way of quit claim deeds from the Buyers to Petitioner and from Petitioner to the Buyers, were to be treated as creating a security interest in the properties. More specifically, Petitioner and the Buyers expressly intended in their respective Building Contracts that the Buyers' quit claim deeds be given to Petitioner as "security during construction." Furthermore, Buyers' quit claim deeds expressly corroborate the parties' intentions by stating "This transfer is made for security purposes" on the face of the deed, and by specifically identifying the property used to secure the debt. Therefore, the Tribunal finds that the Buyers' quit claim deeds to Petitioner created a security interest (i.e., an equitable mortgage) on the Buyers' respective parcel of property.
>
> * * *
>
> The statute is clear and unambiguous that written instruments that transfer property given as security and the assignment or discharge of the security interest are exempt from SRETT[A]. MCL [207.526(d)]. The statute does *not* require the security interest be created by way of mortgage in order to be exempt. If the Legislature would

> wish to limit the exemption contained in § 6 of the SRETTA to mortgages it is free to do so.
>
> Notwithstanding the above, Petitioner's relationship with the Buyers, as their builder and financier, further supports the conclusion that Buyers' quit claim deeds served as an equitable mortgage. Accordingly, Petitioner's quit claim deeds back to the Buyers are a release of said security. Therefore, Petitioner's quit claim deeds to the Buyers are exempt from State transfer tax pursuant to MCL 207.526(d). [Final Opinion and Judgment (MTT Docket No. 359471, July 27, 2010), pp 15-17.]

On the basis of the foregoing findings of fact and conclusions of law, the Tax Tribunal issued its judgment cancelling Treasury's assessments. Treasury appeals by right.

II. STANDARD OF REVIEW

"Absent an allegation of fraud, this Court's review of a tax tribunal decision is limited to determining whether the tribunal committed an error of law or applied the wrong legal principles." *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005); Const 1963, art 6, § 28. The Tax Tribunal's findings of facts are final if they are supported by competent and substantial evidence. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). But the interpretation of a statute is a question of law we review de novo. *Id*.; *AERC of Mich*, 266 Mich App at 722.

III. PERTINENT STATUTORY PROVISIONS

Treasury argues that petitioner's quitclaim deeds back to buyers after completing construction of a home or condominium unit, and the buyers payment for the

added value pursuant to the building contract, is taxable under § 3 of SRETTA, which provides, in part:

> (1) There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:
>
> (a) Contracts for the sale or exchange of property or any interest in the property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.
>
> (b) Deeds or instruments of conveyance of property or any interest in property, for consideration.
>
> * * *
>
> (2) The person who is the seller or grantor of the property is liable for the tax imposed under this act. [MCL 207.523.]

Petitioner contends that the quitclaim deeds of petitioner to the buyers are exempt from taxation under § 6 of SRETTA, which provides, in pertinent part:

> The following written instruments and transfers of property are exempt from the tax imposed by this act:
>
> * * *
>
> (d) A written instrument given as security or an assignment or discharge of the security interest. [MCL 207.526.]

IV. ANALYSIS

We conclude that the Tax Tribunal committed an error of law and relied on the wrong legal principles by granting petitioner the equitable relief of construing each buyer's quitclaim deed as only an equitable mortgage and also each of petitioner's quitclaim deeds as only a discharge of a security interest. Although petitioner and its buyers intended to create and discharge

"strong security," their quitclaim deeds and written contracts establish that they also intended to and did transfer back and forth all property interests attendant to title or ownership of real property. Because petitioner's quitclaim deeds conveyed "any interest in property, for consideration," MCL 207.523(1)(b), and because the Tax Tribunal erred as a matter of law by construing the buyers' quitclaim deeds as only equitable mortgages and petitioner's quitclaim deeds as only their discharge, the Tax Tribunal erred as a matter of law by cancelling Treasury's tax assessment pursuant to MCL 207.526(d).

At the outset, we note that Treasury's primary argument is less than compelling. Treasury argues that petitioner and EDC acted together as a single unit to sell improved property to buyers, specifically structuring the transactions in a manner to avoid paying the transfer tax on the improved value of the land. Treasury argues that other and better methods existed for petitioner to secure its interests and that the transactions at issue were structured as a tax-avoidance device. Because the quitclaim deeds were used as a tax-avoidance device, Treasury asserts, they are not exempt under MCL 207.526(d). Treasury argues that Michigan courts look to the substance of the transaction when the transaction is structured in a tax-dependant manner and is thus a tax-avoidance device. See *Charles E Austin, Inc v Secretary of State*, 321 Mich 426, 434-435; 32 NW2d 694 (1948), and *Mourad Bros, Inc v Dep't of Treasury*, 171 Mich App 792, 797; 431 NW2d 98 (1988).

Treasury's argument is unpersuasive. "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v Helvering*, 293 US 465, 469; 55 S Ct 266; 79

L Ed 596 (1935); see also *Stone v Stone*, 319 Mich 194, 199; 29 NW2d 271 (1947) ("A taxpayer has the legal right to attempt, by lawful means, to minimize taxes . . . ."). Further, this Court has held that when a multiple-party transaction has economic substance, which is required or encouraged by business or regulatory considerations, and not solely for tax avoidance, the government should honor the parties' allocation of rights and duties. *Mourad Bros*, 171 Mich App at 797, citing *Stratton-Cheeseman Mgt Co v Dep't of Treasury*, 159 Mich App 719, 725; 407 NW2d 398 (1987), and *Connors & Mack Hamburgers, Inc v Dep't of Treasury*, 129 Mich App 627, 629-630; 341 NW2d 846 (1983). Here, the Tax Tribunal determined that petitioner and EDC were separate and distinct entities and that determination is supported by competent and substantial evidence. Other than arguing that better methods existed to accomplish the intended purpose of the transactions, Treasury offers no basis to dispute the tribunal's finding of fact that there exists "legitimate business purpose[s], other than avoiding transfer tax, to maintain [petitioner] and [EDC] as separate entities including but not limited to the provisions set forth in the Condominium Act, MCL 559.101 *et seq*., and Land Division Act, MCL 560.101, *et seq*., and tort liability." Because the transactions at issue have economic substance beyond solely tax avoidance, they should be given full effect.

But Treasury also cites a general legal principle regarding the construction of tax exemptions that is very pertinent to the resolution of this case. Specifically, because an " '[e]xemption from taxation effects the unequal removal of the burden generally placed on all landowners to share in the support of local government [and] [s]ince exemption is the antithesis of tax equality, exemption statutes are to be strictly construed in favor

of the taxing unit'." *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 753; 298 NW2d 422 (1980) (citations omitted). As more fully explained by Justice COOLEY:

> "An intention on the part of the [L]egislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt." [*Id*. at 754, quoting 2 Cooley, Taxation (4th ed), § 672, pp 1403-1404.]

Another legal principle of particular importance to the resolution of this case relates to the Tax Tribunal's using equity to grant petitioner relief from the plain terms of MCL 207.523(1)(b). Equity may not be invoked—in the absence of fraud, accident, or mistake—to avoid the dictates of a statute. *Stokes v Millen Roofing Co*, 466 Mich 660, 671-672; 649 NW2d 371 (2002); *Freeman v Wozniak*, 241 Mich App 633, 637-638; 617 NW2d 46 (2000). Consequently, petitioner's intent to structure the quitclaim transactions at issue as tax exempt and its belief regarding the legal import of the transactions are insufficient grounds to grant petitioner equitable relief to reform the quitclaim deeds at issue so that they fall within the purview of MCL 207.526(d). See *Burkhardt v Bailey*, 260 Mich App

636, 659; 680 NW2d 453 (2004); *Sentry Ins v Claimsco Int'l, Inc*, 239 Mich App 443, 447; 608 NW2d 519 (2000).

When they are recorded, MCL 207.523(1)(b) imposes a tax on "[d]eeds or instruments of conveyance of property or any interest in property, for consideration." By these plain terms, a deed or other instrument by which *any* interest in property is conveyed for consideration is subject to the tax when the deed or instrument of conveyance is recorded. The phrase "any interest" is best analyzed using the familiar analogy that real property consists of various rights with each right represented as a stick. A person having all possible rights incident to ownership of a parcel of property has the entire bundle of sticks or a fee simple title to the property. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57 & n 6; 602 NW2d 215 (1999). Important rights flowing from property ownership include the right to exclusive possession, the right to personal use and enjoyment, the right to manage its use by others, and the right to income derived from the property. *Id*. at 57-58 & n 7. Indeed, "title," is defined in Black's Law Dictionary (9th ed), as "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property . . . ."

Each of the real estate transactions at issue was preceded by EDC's conveying a warranty deed of an unimproved lot or condominium unit to the buyer who contracted with petitioner for the construction of a home or residential condominium unit. A warranty deed conveys the entire bundle of rights to the property from the grantor to the grantee in fee simple; it also includes the grantor's covenant that the grantor has good, marketable title and guarantees to the grantee the right of quiet possession. *Allen v Hazen*, 26 Mich 142, 146 (1872); MCL 565.151; 13 Michigan Law &

Practice (2d ed), Deeds, § 3, p 246. The day after receiving EDC's warranty deed, each buyer, by quitclaim deed, conveyed *all* his or her rights to the particular lot or condominium unit to petitioner. "A quitclaim deed is, by definition, '[a] deed that conveys a grantor's *complete interest or claim in certain real property* but that neither warrants nor professes that the title is valid.' " *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378-379; 699 NW2d 272 (2005), quoting Black's Law Dictionary (7th ed). See also MCL 565.3 ("A deed of quit claim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale."), and *Roddy v Roddy*, 342 Mich 66, 69; 68 NW2d 762 (1955) ("It is settled law in this State that a quitclaim deed transfers any interest the grantor may have in the lands, whatever its nature.").

Although each buyer's quitclaim deed to petitioner contains a statement that "[t]his transfer is made for security purposes" and that "[t]his transfer is exempt from transfer tax pursuant to MCLA 207.505(d)[1] and 207.526(d)," there is no language in the quitclaim deed reserving to the buyer-grantor any of the property rights conveyed by EDC's warranty deed the preceding day. "A quitclaim deed is generally construed as conveying all the grantor's interest in the described property unless some interest is expressly excepted or reserved." *Thomas v Steuernol*, 185 Mich App 148, 154-155; 460 NW2d 577 (1990). Additionally, the contract between the buyers and petitioner and their actions during the building phase confirm that the buyers' quitclaim deeds conveyed to petitioner the important property interests

[1] MCL 207.505(d) provides an exemption with language nearly identical to MCL 207.526(d) applicable to the tax imposed under the county real estate transfer tax act, MCL 207.501 *et seq*.

of possession and control of the pertinent lot or condominium unit. Consequently, while all the buyers' quitclaim deeds to petitioner provided strong security to petitioner regarding its construction contract, they also transferred all of the buyers' property rights in the lot or condominium unit, received through the prior warranty deed, to petitioner.[2]

Pursuant to the construction contract between the buyer and petitioner, after petitioner completed constructing the buyer's home or condominium unit and the buyer paid the contract price, petitioner would surrender possession of the home or condominium unit to the buyer. A closing would also occur where petitioner would "release its security *and* quit claim *title* back to the Buyer . . . ." (Emphasis added.) Although petitioner's quitclaim deeds state that they are exempt from the county transfer tax, MCL 207.505(d), and the state transfer tax, MCL 207.526(d), they do not limit the conveyance to only a "discharge of [a] security interest." *Id*. The operative words of transfer in the deeds are "quit claim," which, as noted already, transfer all of the grantor's rights in the property to the grantee. *Roddy*, 342 Mich at 69; *Thomas*, 185 Mich App at 154-155. Thus, petitioner's quitclaim deeds back to the buyer do more than "release its security"—they also transfer "title" back to the buyer. Here, "title" would include all property interests in the property, such as possession and the legal right to control and dispose of property that the buyer had previously quitclaimed to petitioner. Because petitioner's quitclaim deeds transferred "any interest in property"—all the property

[2] The quitclaim deeds clearly provide strong security because in the event of a buyer's default, petitioner would not need to foreclose a mortgage or a construction lien since the buyer would already have transferred all of his or her property rights in the lot or condominium unit to petitioner.

rights the buyers had previously transferred to petitioner—"for consideration"—the contract price for the improvements made while in petitioner's possession and control, petitioner's quitclaim deeds are plainly taxable under MCL 207.523(1)(b), unless specifically exempted by MCL 207.526(d).

MCL 207.526(d), as a tax-exemption statute, must be strictly construed for the reasons discussed by Justice COOLEY in his treatise and quoted in *Ladies Literary Club*, 409 Mich at 754. MCL 207.526(d), pertinent to petitioner's quitclaim deeds, only exempts a "discharge of [a] security interest" previously given. The exemption can apply in this instance only if the pertinent portion of MCL 207.526(d) is interpreted to read: a "discharge of [a] security interest" previously given as part of a deed or instrument also conveying any other interest in the property. But such an expansion of the exemption beyond its express wording is not permitted. *Ladies Literary Club*, 409 Mich at 753-754. Consequently, the Tax Tribunal correctly applied MCL 207.526(d) to exempt petitioner's quitclaim deeds from taxation under MCL 207.523(1)(b) only if it properly invoked equity to reform the buyers' quitclaim deeds to convey only an equitable mortgage and also correctly reformed petitioner's quitclaim deeds to only discharge an equitable mortgage. See *Fletcher v Morlock*, 251 Mich 96, 98-99; 231 NW 59 (1930) (where a deed is construed to be an equitable mortgage, a grantee's reconveyance to the grantor is construed to be a discharge of the equitable mortgage).

Michigan has long recognized equitable mortgages. In *Abbott v Godfroy's Heirs*, 1 Mich 178, 181 (1849), the Court held that an equitable mortgage arose from the parties' intent to create by a written agreement a lien on real estate for the payment of a debt, but the written

agreement was legally defective. Thus, courts may reform a defective instrument to reflect the parties' intent. As stated in 1 Cameron, Michigan Real Property Law (3d ed), Mortgages, § 18.5, pp 681-682:

> A court of equity may impose and foreclose an equitable mortgage on a parcel of real property when no valid mortgage exists but some sort of lien is required by the facts and circumstances of the parties' relationship. Generally an equitable mortgage will be imposed if it is shown that there was an intention to place a lien on the real estate or a promise that the real estate would be used as security but for some reason the intended purpose was not accomplished. . . . For example, a defective mortgage may have been executed.

Additionally, an equitable mortgage may arise in other circumstances, for example, where a deed purports to convey a fee simple estate, but the parties intended only a mortgage. *Id*., § 18.6, pp 683-684; see also *Burkhardt*, 260 Mich App at 659 ("An equitable mortgage places the substance of the parties' intent over form."), and *Townsend v Chase Manhattan Mtg Corp*, 254 Mich App 133, 138; 657 NW2d 741 (2002). As its name implies, equitable principles are the heart of the doctrine: "The whole doctrine of equitable mortgages is founded upon the ancient, cardinal maxim of equity which regards that as done which was agreed to be done . . . ." *Schram v Burt*, 111 F2d 557, 562 (CA 6, 1940). Even without a written contract, " 'from the relations of the parties, equity will declare a lien out of considerations of right and justice, based upon those maxims which lie at the foundation of equity jurisprudence.' " *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 53; 503 NW2d 639 (1993), quoting *Kelly v Kelly*, 54 Mich 30, 47; 19 NW 580 (1884).

Further, "[e]quity will create a lien only in those cases where the party entitled thereto has been pre-

vented by fraud, accident, or mistake from securing that to which he was equitably entitled." *Cheff v Haan*, 269 Mich 593, 598; 257 NW 894 (1934). Thus, merely advancing money to improve real property with an understanding a lien would be given will not create an equitable lien. *Id*. Moreover, "[a] party that has an adequate remedy at law is not entitled to an equitable lien." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 284; 761 NW2d 761 (2008).

In the present case, there is no basis in equity to reform the parties' quitclaim deeds. There was no fraud, accident, or mistake that prevented the parties to the real estate transactions at issue from crafting instruments that solely created or discharged a security interest so as to come within the exemption of MCL 207.526(d). As noted already, petitioner's mistaken belief that the quitclaim deeds were not taxable provided no basis to invoke equitable relief. *Burkhardt*, 260 Mich App at 659; *Sentry Ins*, 239 Mich App at 447. Nor is invoking the intent of petitioner (and its buyers) a sufficient basis to equitably reform the quitclaim deeds at issue. Petitioner fully intended and required by contract that buyers quitclaim title, including the rights of possession and control of the pertinent lot or condominium unit, to petitioner before it began constructing a home or condominium unit on the lot. Further, petitioner fully intended by its quitclaim deeds at issue to transfer title, including the rights of possession and control, back to the buyer upon the buyer's payment of the consideration after construction of either the residence or condominium. Consequently, there is no basis in equity for the Tax Tribunal to reform the buyers' quitclaim deeds to equitable mortgages or to conclude that petitioner's quitclaim deeds were issued solely as "discharge[s] of the security interest." MCL 207.526(d).

This is so even if the buyers' quitclaim deeds could be considered "written instrument[s] given as security . . . ." *Id*.

In conclusion, whether petitioner and EDC are separate entities, whether the parties intended to create security interests, whether there are legitimate business reasons to structure the transactions the way they were, and whether petitioner believed the transactions were tax exempt, we conclude that petitioner's quitclaim deeds were still taxable because they conveyed "any interest" in property for consideration, MCL 207.523(1)(b), beyond just a "discharge of [a] security interest." MCL 207.526(d). Thus, the value added to the lot or condominium unit by petitioner's construction of a home on a lot or a condo within the unit is taxable. MCL 207.523(1)(b); MCL 207.532. The Tax Tribunal erred as a matter of law by granting petitioner equitable relief and cancelling Treasury's assessments.

We reverse.

TALBOT, P.J., and FITZGERALD and MARKEY, JJ., concurred.

ANDRIE INC v DEPARTMENT OF TREASURY

Docket No. 301615. Submitted February 8, 2012, at Lansing. Decided April 26, 2012, 9:00 a.m. Leave to appeal granted, 493 Mich 900.

Andrie Inc. filed an action in the Court of Claims, seeking a refund of use taxes paid under protest for the years 1999 through 2006. During that time, Andrie shipped asphalt on three barges to various customers in the Great Lakes area. A specific tug boat was in dedicated service to a particular barge for all shipments because the barges were unable to move in the water without assistance. Each tug boat had a registered tonnage of less than 500 tons, and each barge had a registered tonnage of over 500 tons. The Department of Treasury determined that the tug boats did not qualify for the fuel and supplies exemption, MCL 205.94(1)(j), of the Use Tax Act, MCL 205.91 *et seq*. and assessed Andrie $613,183 for unpaid-tax liability. The court, Paula J. M. Manderfield, J., concluded that Andrie's tugs were entitled to the use-tax exemption because they were each part of a tug-barge unit that constituted a single vessel for purposes of MCL 205.94(1)(j), The court also determined that the barges alone had registered tonnages exceeding 500 tons, the tug-barge units were engaged in interstate commerce for a percentage of the time and that Andrie was entitled to a use-tax exemption for fuel and supplies used by both the tug boats and barges. The court noted that the department was entitled to impose a use tax on the fuel and supplies used in foreign commerce while the tug-barge units were on Michigan water. Finally the court concluded that Andrie was entitled to the presumption that the sales tax was paid on the disputed transactions. The department appealed.

The Court of Appeals *held*:

1. The Use Tax Act, MCL 205.91 *et seq*., imposes a tax on the purchaser for the privilege of using, storing or consuming tangible personal property in this state. Under MCL 205.94(1)(j) a purchase is exempt from the use tax (1) if a vessel was designed for commercial use of registered tonnage of 500 tons or more, if produced upon special order of the purchaser, and (2) if the purchase was for bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500

tons or more and is also engaged in interstate commerce. The trial court erred as a matter of law when it determined that Andrie's tug-barge combinations constituted single vessels qualifying for the exemption under the Use Tax Act. The plain language of MCL 205.94(1)(j) exempts the supplies of a single watercraft that is 500 or more tons and does not apply to a multiple vessels acting as a single vessel. The tugs and barges were separate vessels that were registered individually with their own names and tonnage. Moreover, expert testimony established that pilot licensing requirements did not treat tugs and barges as individual vessels. Because the tugs had a tonnage of less than 500 tons, the exemption in MCL 205.94(1)(j) did not apply. The court would not read additional language into this exemption to make it apply to multiple vessels acting as a single unit. A barge and tug in dedicated service did not qualify as a single vessel under MCL 205.94(1)(j).

2. The property or services under MCL 205.94(1) are exempt from the use tax only to the extent that the property or services are used for the exempt purpose stated in that section. The exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the department. In accordance with over a century of judicial decisions, all parts of goods that travel in commerce between states, including those portions that only travel intrastate, constitute interstate commerce and the Legislature is presumed to have been aware of this specific meaning when enacting the Use Tax Act. A vessel or vehicle is used in interstate commerce if it carries goods moving in a continuous stream from an origin in one state to a destination in another. Thus, interstate commerce is broadly defined and may include a shipment transported entirely within a single state. The trial court did not clearly err by concluding that Andrie's voyages between Michigan ports constituted interstate commerce with respect to MCL 205.94(1)(j) because the asphalt carried by the tug-barge units was regularly shipped to assorted road and paving companies throughout the Great Lakes region.

3. The Use Tax Act imposes a tax for the privilege of using, storing, or consuming tangible personal property in this state. MCL 205.93(1). The trial court clearly erred by concluding that the assessment of the use tax was limited to personal property used in Michigan because under the plain language of MCL 205.93(1), tangible personal property that is merely stored in Michigan is also subject to the use tax.

4. The General Sales Tax Act, MCL 205.51 *et seq*., imposes a tax on retail sales of tangible personal property within the state of Michigan. The sales tax is imposed on the retailer for the privilege

of engaging in the business of making retail sales. The use tax exempts from taxation property on which a sales tax is paid; if a transaction is subject to sales tax it is necessarily not subject to the use tax. The items Andrie purchased from Michigan retailers were not subject to the use tax. The retailers had the ultimate responsibility to pay any sales tax on those transactions and the department may not place a duty on Andrie, as the purchaser, to show that the sales tax was paid to the state. The court properly determined that the department erred by assessing Andrie for use tax on purchases made from Michigan retailers when Andrie was unable to prove that any sales tax was paid on those purchases.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. TAXATION — USE TAX — EXEMPTIONS.

The Use Tax Act, MCL 205.91 *et seq*., imposes a tax on the purchaser for the privilege of using, storing or consuming tangible personal property in this state; under MCL 205.94(1)(j) a purchase is exempt from the use tax (1) if a vessel was designed for commercial use of registered tonnage of 500 tons or more, if produced upon special order of the purchaser, and (2) if the purchase was for bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more and is also engaged in interstate commerce; MCL 205.94(1)(j) does not apply to a multiple vessels acting as a single vessel; a barge and tug in dedicated service did not qualify as a single vessel under MCL 205.94(1)(j).

2. TAXATION — USE TAX — EXEMPTIONS — INTERSTATE COMMERCE REQUIREMENT.

Property or services under MCL 205.94(1) are exempt from the use tax only to the extent that they are used for the exempt purpose stated in that section; all parts of goods that travel in commerce between states, including those portions that only travel intrastate, constitute interstate commerce; a vessel or vehicle is used in interstate commerce if it carries goods moving in a continuous stream from an origin in one state to a destination in another.

3. TAXATION — GENERAL SALES TAX — RETAILERS — DUTY TO PAY SALES TAX.

The General Sales Tax Act, MCL 205.51 *et seq*., imposes a tax on retail sales of tangible personal property within the state of Michigan and is imposed on the retailer for the privilege of engaging in the business of making retail sales; because retailers have the ultimate responsibility to pay any sales tax on those

transactions, the Department of Treasury may not place a duty on a purchaser to show that the sales tax was paid to the state.

Honigman Miller Schwartz & Cohn LLP (by *June Summers Haas* and *Brian T. Quinn*), for Andrie Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jessica A. McGivney* and *Bradley K. Morton*, Assistant Attorneys General, for the Department of Treasury.

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

WILDER, J. Defendant appeals as of right an order granting plaintiff a partial refund on use taxes paid under protest. On appeal, defendant contends that it properly assessed use taxes on plaintiff for the years 1999 through 2006. We affirm in part, reverse in part, and remand.

I. BASIC FACTS

A. TUG-BARGE UNITS

Plaintiff is a marine transportation and marine construction business headquartered in Muskegon, Michigan. The marine-transportation activities, which form the basis for the instant litigation, involve shipping asphalt to various customers in the Great Lakes area. Typically, plaintiff loaded asphalt from an oil refinery and shipped it to various ports in Indiana, Wisconsin, Michigan, Illinois, Ohio, New York, and Ontario.

The years at issue in this tax-dispute case are 1999 through 2006. During this time, plaintiff used three barges to transport the asphalt. Because the barges were unmanned and incapable of independent move-

ment, they could only move with outside assistance. In providing that assistance, plaintiff assigned a particular tug boat (tug) to each of its barges. Barge A-410 was paired with the Tug Rebecca Lynn, Barge A-390 was paired with the Tug Barbara Andrie, and Barge A-397 was paired with the Tug Karen Andrie. It is undisputed that each tug has a registered tonnage of less than 500 tons, and each barge has a registered tonnage of over 500 tons. Captain Richard DiNapoli, an expert in the field of maritime construction, operations, and contracts, testified that the tugs in question are simply "detachable mode[s] of power sources" for the barges.

To prepare for this case, DiNapoli reviewed the deck logs for the tugs and barges in dispute between 1999 and 2006. After reviewing these deck logs, DiNapoli concluded that he had no doubt that each tug-barge pair operated in "dedicated service."[1] In other words, each particular tug was "married" to a particular barge, forming a singular "unit." He explained that dedicated tug-barge units are common for longer shipments between different harbors. He stated that the term "dedicated service" is a term of art in the industry but acknowledged it may not be included in a specific Coast Guard regulation. Non-dedicated tugs, DiNapoli explained, are often "harbor tugs" because they generally move multiple barges within a single harbor. DiNapoli further explained that while Coast Guard regulations require separate deck logs for harbor tugs and nondedi-

[1] DiNapoli clarified that even though the tugs and barges were in dedicated service to each other, they were not an "integrated tug-barge" unit or "ITB" as defined by Coast Guard regulations because the units lacked a "special bow connection." Instead, DiNapoli testified that all of the units used conventional connections of wire tow lines. He also admitted that one of the tugs was retrofitted with this special bow connection system to qualify as an ITB, but it happened after the time period at issue.

cated barges, only one deck log is required for dedicated, "single marine transportation units," such as plaintiff's tug-barge units.

DiNapoli's review of the deck logs indicated that the tugs had participated in "extraneous activities," but they never violated the "dedicated service profile." For example, a tug may have worked independently from its barge to refuel or break ice in the harbor's entrance channel while the barge unloaded its contents. Further, according to DiNapoli, the Karen Andrie had participated in an annual tugboat race. We also note that at least at one time during the period in question, one of the tugs worked with a barge to which it was not assigned.[2] DiNapoli opined that these types of activities did not invalidate the "dedicated service profile" because each barge essentially depended on its tug "for everything," and the tugs' activities never caused a delay in the barges' movements.

B. TAX DISPUTE

Defendant audited plaintiff for the period between 1999 and the middle of 2006. Defendant determined that plaintiff owed a total of $613,183 for unpaid use-tax liability. This assessment was based on the auditor determining that plaintiff's *tugs* did not qualify for the fuel and supplies exemption specified in MCL 205.94(1)(j)[3].

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[2] Specifically, in 2004 the Rebecca Lynn had towed Barge A-390, when normally the Barbara Andrie would tow Barge A-390. *Horton v Andrie, Inc*, 408 F Supp 2d 477, 479 (WD Mich, 2005).

[3] MCL 205.94(1)(j) states that the following is exempt from use tax: "A vessel designed for commercial use of registered tonnage of 500 tons or more, if produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce."

But because the *barges* were vessels over 500 tons, defendant determined that they did qualify for the fuel and supplies exemption. Defendant concluded that 93 percent of plaintiff's voyage miles were interstate commerce. Defendant calculated this apportionment by dividing the number of miles traveled between a Michigan port and a port of another state by the total number of miles traveled. The remaining seven percent consisted of either (1) voyages between two Michigan ports (intrastate commerce) or (2) voyages between a Michigan port and a Canadian port (foreign commerce). Defendant determined that fuel and supplies used by the barges for the interstate commerce voyage miles were exempt under MCL 205.94(1)(j), whereas the remaining seven percent were subject to tax. Again, defendant concluded that none of the fuel and supplies used by the tugs was tax exempt because the tugs had a registered tonnage of less than 500 tons.

Defendant also concluded that plaintiff failed to pay use tax on certain transactions in the state of Michigan where it could provide no supporting documentation to show that sales tax had already been paid.

C. COURT OF CLAIMS PROCEEDING

Plaintiff paid the tax assessment under protest and then filed this case with the Court of Claims to obtain a refund. Plaintiff's challenge to the tax assessment raised four distinct issues: (1) whether defendant improperly found that fuel and supplies purchased for the tugs were not entitled to the fuel and supplies exemption; (2) whether defendant's apportionment of the voyage miles was contrary to law; (3) whether defendant improperly attempted to assess use tax on purchases that had been subject to sales tax; and (4) whether the use-tax exemp-

tion apportionment violated the Duty of Tonnage Clause of the United States Constitution.[4]

On November 22, 2010, the trial court issued its opinion and order explaining that plaintiff's tugs would be entitled to the use-tax exemption under MCL 205.94(1)(j) if (1) they constituted "vessels," (2) the vessels had a registered tonnage of 500 tons or more, (3) the fuel, provisions, supplies, and repairs were used exclusively by these vessels, and (4) these vessels were engaged in interstate commerce.

The trial court held that each of plaintiff's tugs qualified for the exemption because they were part of a tug-barge unit that constituted "a vessel" under MCL 205.94(1)(j). The trial court also noted that (1) the barges alone had registered tonnages exceeding 500 tons, (2) the tug-barge units were engaged in interstate commerce at least some of the time, and (3) the parties did not dispute that the fuel and supplies at issue were used exclusively by the tug-barge units. Thus, the court concluded that plaintiff was entitled to a use-tax exemption under MCL 205.94(1)(j) for fuel and supplies used by the tugs and the barges, not only the barges.

The trial court then concluded that plaintiff was entitled to the exemption only for the supplies used in interstate commerce. But the court also determined that defendant's classification of "intrastate" commerce was actually "interstate" commerce. Thus, because plaintiff was entitled to a use-tax exemption for its so-called "intrastate commerce" activities as well, plaintiff was entitled to a use-tax exemption for everything except its foreign commerce.

The trial court further explained that defendant was not entitled to assess use tax on all fuel and supplies

[4] US Const, art I, § 10, cl 3.

used in foreign commerce. Rather, defendant was only entitled to assess use tax on the fuel and supplies used in foreign commerce while the tug-barge units were on Michigan waters.

The trial court also concluded that plaintiff was entitled to the presumption that the sales tax was paid on the disputed transactions. Because defendant did not rebut that presumption, plaintiff could not be assessed the use tax on the disputed transactions.

The trial court declined to address plaintiff's fourth issue regarding the Tonnage Clause since it was not necessary for the resolution of the case.

II. ANALYSIS

A. USE TAX

Defendant argues that the trial court erred when it determined that each of plaintiff's tug-barge combinations were a single "vessel," as opposed to separate ones, for purposes of Michigan's use tax. We agree.

Resolution of this issue involves the interpretation of the relevant exemption, which we review de novo. *Herman v Berrien Co*, 481 Mich 352, 358; 750 NW2d 570 (2008). An "application of the facts to the law" is also subject to de novo review. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). And we review a trial court's findings of fact at a bench trial for clear error. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake was made. *Id.* at 251.

The Use Tax Act, MCL 205.91 *et seq*., imposes a "tax for the privilege of using, storing, or consuming tangible personal property in this state . . . ." MCL

205.93(1). The legal obligation of the use tax is imposed on the consumer or the purchaser. *Combustion Engineering, Inc v Dep't of Treasury*, 216 Mich App 465, 468; 549 NW2d 364 (1996). But MCL 205.94 provides for exemptions to the use tax. Relevant for the present case, MCL 205.94(1)(j) provides two types of exemptions: (1) "[a] vessel designed for commercial use of registered tonnage of 500 tons or more, if produced upon special order of the purchaser," and (2) "bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce." Because this case involves the taxing of the tug boats' fuel and supplies, only this latter aspect of the exemption is relevant for the issues on appeal.

Defendant argues that plaintiff's tugs are not "vessels" with registered tonnage over 500 tons. Therefore, it asserts that fuel and supplies used for the tugs are not entitled to the use tax exemption provided in MCL 205.94(1)(j). This issue turns on whether a tug and barge physically connected and in dedicated service to each other is a single vessel or two distinct vessels for purposes of the Use Tax Act.

To interpret a statute, this Court first gives "effect to the intent of the Legislature." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 599; 575 NW2d 751 (1998). When the language of a statute is plain and unambiguous, the legislative intent is indicated by the ordinary and generally accepted meaning of that language. *Id.* In other words, "[w]here the language of a statute is clear, [this Court] will enforce the statute as written because the Legislature must have intended the meaning it plainly expressed." *Id.* Finally, "[tax] exemption statutes are interpreted according to ordinary rules of statutory

construction." *Cowen v Dep't of Treasury*, 204 Mich App 428, 431; 516 NW2d 511 (1994).

As a general rule, "tax laws are construed against the government." *DeKoning v Dep't of Treasury*, 211 Mich App 359, 361; 536 NW2d 231 (1995). "However, tax exemption statutes are to be strictly construed in favor of the taxing unit." *Id.* at 361-362. The taxpayer therefore has the burden of showing entitlement to an exemption. *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144,150; 549 NW2d 837 (1996).

We note that no Michigan published cases have addressed this issue. Plaintiff contends that by attaching its tugs to its 500-plus-ton barges, the resulting coupling creates a single "vessel" under the Use Tax Act. The exemption at issue in MCL 205.94(j)(1) applies to supplies used by "a vessel of 500 tons or more." The plain reading of the provision reveals that the Legislature intended the exclusion to apply to a *single* vessel that is 500 or more tons. This is evident from the use of the indefinite article "a", which is "[u]sed before nouns and noun phrases that denote a single but unspecified person or thing." *The American Heritage Dictionary of the English Language* (1996). The term "vessel," in turn, is defined by *Random House Webster's College Dictionary* (1997) as "a craft for traveling on water . . . ." Therefore, the plain language of the statute allows for the exemption to apply to supplies of a *single* watercraft that is 500 or more tons. Nothing in the statute allows for multiple vessels *acting as* a single vessel to qualify for the exemption. Instead, only actual, single vessels are covered by the exemption. It is undisputed that the tugs and barges are, in actuality, separate vessels. They are all registered individually with their own names and their own tonnage, with each tug having a tonnage of less than 500 tons. Therefore, as a

matter of law, the supplies for the tugs cannot qualify for the exemption under MCL 205.94(j)(1). To read the provision as allowing multiple vessels acting as a single unit to qualify as "a vessel" requires reading additional language into MCL 205.94(1)(j), thereby violating a fundamental canon of statutory interpretation. *In re Marin*, 198 Mich App 560, 564; 499 NW2d 400 (1993). If the Legislature intended the exemption to apply to multiple vessels working in unison, it easily could have stated as such.

Furthermore, the testimony of plaintiff's own expert illustrates how two vessels counting as a single unit is a fiction. The expert testified that the requirements behind a captain's piloting license are dependent upon the piloted vessel's size. He explained that, as in aviation where a 747 pilot has much more strenuous licensing requirements than someone who flies a smaller aircraft, the same applies to watercraft. In other words, the larger the vessel, the more certification requirements one needs to captain such a ship. But the expert explained that the captains of plaintiff's tugs only had to be qualified for the tonnage of the tugs themselves—not the combined tonnage of the tug-barge "units." Likewise, the tug-barge units only had to be staffed according to the tonnage of the smaller tugs, not the tonnage of the combined units. While these facts are not dispositive, it shows that our treatment of the issue is consistent with how the licensing requirements treat the tugs and barges as individual vessels also.

Plaintiff further claims that the fact that his tugs are in dedicated service to particular barges is sufficient for each tug-barge coupling to be considered a single vessel. We disagree. If plaintiff was correct, we would not only have to read "vessel" as including multiple vessels working in tandem, but we also would have to read into

the statute that the exemption would only apply if the vessels were in dedicated service to each other. This is taking the plain language of the statute and stretching it too far. We decline to read more into the statute than what it states. *Id.*

Furthermore, assuming that a tug and barge working in tandem did qualify as a single vessel, the fact that they may be working in "dedicated service" should be irrelevant. For example, assume Tug A is in dedicated service to Barge 1 and that they logged 50,000 miles together over the course of the year. On the other end of the harbor, you have Harbor Tug B that worked with numerous different barges over the course of the year, also traveling 50,000 miles. According to plaintiff, Tug A should qualify for the exemption, while Harbor Tug B should not. This outcome lacks any underlying rationale. Both Tug A and Harbor Tug B always were attached to or working with a 500-plus ton barge. The fact that Tug A was "monogamous" does not change the fact that Harbor Tug B never operated independently and was always attached to a barge. Thus, there is no basis for suggesting that Tug A was working as a 500-plus ton vessel for the entire year, but Harbor Tug B was not. In short, we hold that coupling a barge and a tug together, even if in dedicated service, does not transform them into a singular vessel for purposes of the use-tax exemption of MCL 205.94(1)(j).

Plaintiff also argues that we should affirm on the basis that the trial court's finding should be given great deference as any other factual finding by a trial court. While a trial court's factual findings are reviewed for clear error, *Chelsea Investment Group*, 288 Mich App at 250, a trial court's application of its facts to the law is reviewed de novo, *Van Buren Twp*, 258 Mich App at 598. Because we determined that a vessel is a single unit,

and not multiple units merely *operating* as a single unit, the trial court erred as a matter of law when it concluded that tugs attached to barges can constitute a single vessel under the use-tax exemption of MCL 205.94(1)(j). Physically connecting tugs to barges does not destroy the individual character of each vessel because each vessel still maintains its own name, registration, and tonnage.

B. APPORTIONMENT

1. INTERSTATE VS. INTRASTATE COMMERCE

Because we have determined that plaintiff's tugs were not eligible for the exemption, we now turn to the apportionment of the barges' exemption. Again, the Use Tax Act provides an exemption for "bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in *interstate commerce*." MCL 205.94(1)(j) (emphasis added). This exemption is limited by MCL 205.94(2), which provides as follows:

> The property or services under subsection (1) are exempt only to the extent that the property or services are used for the exempt purposes if one is stated in subsection (1). The exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the department.

The trial court determined that the barges' intrastate trips qualified as interstate commerce because "under the broad definition of interstate commerce that the U.S. Supreme Court has adopted, [*The Daniel Ball*, 77 US (10 Wall) 557; 19 L Ed 999 (1871)] when goods are traveling in commerce between states, all parts of that transport, even those portions traveled only intrastate, . . . constitute interstate commerce." We agree with this conclusion.

Because this Court presumes that the Legislature is fully aware of judicial decisions, the term "interstate commerce" as used in the Use Tax Act has the "peculiar and appropriate meaning in the law that those words have acquired in over a century of judicial decisions applying the Commerce Clause of the United States Constitution." *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 41; 761 NW2d 269 (2008) (quotation marks omitted).

With respect to interstate commerce, this Court explained that "[c]ourts have consistently found that even if a vessel or vehicle never leaves a state, it is 'used in interstate commerce' if it carries goods moving in a continuous stream from an origin in one state to a destination in another." *Id.* at 42. Interstate commerce is therefore broadly defined and may include a shipment transported entirely within a single state. See, e.g., *The Daniel Ball*, 77 US (10 Wall) at 564-566 (noting that a ship moving from one Michigan port to another Michigan port is engaged in interstate commerce because it carried goods destined for other states).

Therefore, the trial court finding that plaintiff's voyages between Michigan ports constituted interstate commerce under MCL 205.94(1)(j) was not clearly erroneous. The testimony at the bench trial had indicated that plaintiff's asphalt was regularly shipped to various road paving and construction companies throughout the Great Lakes region. Accordingly, under the rationale of *The Daniel Ball* and numerous other United States Supreme Court decisions, plaintiff's shipments between Michigan ports constituted "interstate commerce." See *Alvan Motor Fright*, 281 Mich App at 41-42.

Defendant's reliance on this Court's decision in *Bob-Lo Co v Dep't of Treasury*, 112 Mich App 231; 315 NW2d 902 (1982) is misplaced. In *Bob-Lo*, this Court

held that the plaintiff's steamers, which transported passengers from Detroit to Wyandotte and then to Bob-Lo Island in Ontario, Canada, were not entitled to the use-tax exemption for the fuel and supplies[5] used in interstate commerce. *Id.* at 233, 244-245. The Court noted that both the United States Supreme Court and the Michigan Supreme Court previously determined that plaintiff's activity was *foreign* commerce. *Id.* at 244. Thus, the activity could not qualify under the interstate commerce exemption. As the *Alvan Motor Freight* Court summarized, "[T]he *Bob-Lo* decision is inapposite because the Court could not and did not alter United States Supreme Court precedent . . . and was decided on the basis that the activity in *Bob-Lo* was foreign commerce, not interstate commerce." *Alvan Motor Freight*, 281 Mich App at 47.

2. FOREIGN-COMMERCE APPORTIONMENT

There is no dispute that vessels participating in foreign commerce cannot take advantage of the interstate commerce exemption discussed above. Defendant, however, argues that the trial court erred when it imposed the use tax on plaintiff's fuel and supplies that were only *used* in Michigan, while engaging in foreign commerce. We agree.

The Use Tax Act imposes a "tax for the privilege of using, *storing*, or consuming tangible personal property in this state." MCL 205.93(1) (emphasis added). According to the plain language of the statute, if any tangible personal property is merely stored in Michigan, it is subject to the use tax. See *Guardian Indus Corp v Dep't*

[5] The use-tax exemption at issue in *Bob-Lo* was MCL 205.94(k). The language of the exemption in *Bob-Lo* was identical to the exemption at issue in this case; a 2001 amendment changed the subsection from (k) to (j). 2001 PA 39.

of Treasury, 243 Mich App 244, 256; 621 NW2d 450 (2000). Therefore, the trial court erred when it stated that the assessment of use tax was limited to "personal property **used in Michigan**." The trial court further explained that

> [d]uring trips between Michigan and Canada, clearly only some of the fuel and supplies used would be used in Michigan waters, while some would be used in Canadian waters. Accordingly, by finding all fuel and supplies used on voyages between Michigan and Canada to be taxable, Defendant improperly calculated the apportionment.

Therefore, with respect to plaintiff's foreign commerce, the trial court on remand is to apportion the use tax for plaintiff's use, consumption, and *storage* of tangible personal property in the state. We note that it may be that the entirety of the fuel and supplies used for foreign commerce may be subject to the use tax because all of that tangible personal property, at one point, may have been stored in Michigan.

C. SALES TAX VS. USE TAX

Defendant next argues that the trial court erred when it failed to impose use tax on certain personal property that was purchased in Michigan. We disagree.

Here, plaintiff purchased certain items from Michigan retailers. After plaintiff failed to prove that any sales tax was paid on the purchases, defendant assessed use tax on those items. The trial court determined that since they were sold within the state, the transaction was only subject to sales tax.

The General Sales Tax Act, MCL 205.51 *et seq*., imposes a tax on retail sales of "tangible personal property" within the state of Michigan. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 407-408; 590 NW2d

293 (1999). The sales tax is imposed on the *retailer* for "the privilege of engaging in the business of making retail sales." *Combustion Engineering*, 216 Mich App at 467. The retailer is not obligated to include the sales tax in the property's selling price, although the retailer has this option. *Id.* Thus, while the sales tax is "ordinarily passed on to the purchaser at retail, the retailer is obligated to pay the tax due and bears the direct legal incidence of the General Sales Tax Act." *Id.* Additionally, "the use tax exempts from taxation property on which a sales tax is paid." *Id.* at 468.

Our Supreme Court and this Court have held on multiple occasions that the mere fact that a transaction is subject to sales tax necessarily means that the transaction is not subject to use tax. See, e.g., *Elias Bros*, 452 Mich at 146 n 1 ("The Use Tax Act, as amended, is an 'excise' or 'privilege' tax that covers transactions not subject to the general sales tax."), and *Fisher & Co, Inc v Dep't of Treasury*, 282 Mich App 207, 209; 769 NW2d 740 (2009) ("The Use Tax Act is complementary to the Michigan General Sales Tax Act . . . and is designed to cover those transactions not subject to the sales tax.").

In the present case, there is no dispute that the transactions in question involved Michigan retailers and transfers of title within the state of Michigan. Because the retailer has the ultimate responsibility to pay any sales tax, it is erroneous to place a duty on a purchaser to show that the sales tax was indeed paid to the state. *Combustion Engineering*, 216 Mich App at 469. Thus, the transactions are not subject to use tax, and the trial court properly held in favor of plaintiff on this issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do

not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, a public question having been involved.

FITZGERALD, P.J., and MURRAY, J., concurred with WILDER, J.

FROWNER v SMITH

Docket No. 305704. Submitted March 15, 2012, at Detroit. Decided April 26, 2012, at 9:05 a.m.

Davion Frowner was born to Diane Frowner and Lamonte A. Smith in 1999. Davion's parents never married, but in 2000, Smith acknowledged paternity and began paying child support. Diane died in 2007 and Davion, who had resided with his mother since his birth, went to live with Diane's parents, Herbert and Deborah Frowner. Herbert and Deborah petitioned the Wayne Circuit Court to be appointed guardians. Smith responded with a motion for custody. The parties eventually signed a consent order for custody, parenting time, and child support in August 2008 that provided that Smith and the Frowners would jointly share Davion's legal custody and Davion's primary residence would remain with the Frowners until further order of the court. Smith moved for a change of custody in 2011. A hearing referee recommended that the motion be denied because Smith had not stated a change of circumstances to warrant reviewing the issue of custody. The court, Kathleen M. McCarthy, J., denied the motion, refusing to evaluate whether the child's best interests would be served by awarding custody to Smith, on the basis that Smith failed to demonstrate proper cause or a change in circumstances to warrant a custody hearing to determine the child's best interests. Smith appealed.

The Court of Appeals *held*:

The circuit court clearly erred by imposing on Smith the threshold burden of proving that proper cause or changed circumstances justified a custody hearing. A natural parent possesses a fundamental interest in the companionship, custody, care, and management of his or her child protected by the due process provisions of US Const, Am XIV and Const 1963, art 1, § 17. The parental presumption in MCL 722.25(1) codifies the fundamental tenet that, in a custody disagreement between a fit parent and a third party, the fit parent has the advantage. When there is a conflict between the presumption in MCL 722.25(1) that, in a custody dispute between a parent and a third person, the court shall presume that the best interests of the child are served by

awarding custody to the parent, unless the contrary is established by clear and convincing evidence, and the presumption in MCL 722.27(1)(c) that provides for modification of a custody arrangement only upon a showing of proper cause or change of circumstances, the parental presumption of MCL 722.25(1) controls. The trial court erred by applying MCL 722.27(1)(c) in this case. The trial court's order is reversed and the case is remanded to the trial court for a best-interests hearing at which, in order for the Frowners to be granted continuing custody, the Frowners have the burden of establishing by clear and convincing evidence that it is not in Davion's best interest for Smith to have custody of Davion.

Reversed and remanded.

PARENT AND CHILD — CHILD CUSTODY — CONFLICT OF LAWS.

When there is a conflict between the parental presumption in MCL 722.25(1), which provides that in a custody dispute between a parent and a third person the court shall presume that the best interests of the child are served by awarding custody to the parent, unless the contrary is established by clear and convincing evidence, and the presumption in MCL 722.27(1)(c), which provides for the modification of a child custody arrangement only when there is a showing of proper cause or changed circumstances, the parental presumption of MCL 722.25(1) controls.

Sandra M. Larson for Herbert and Deborah Frowner.

Lamonte A. Smith *in propria persona*.

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

GLEICHER, J. This is a child-custody dispute between a noncustodial father and the child's maternal grandparents, the boy's third-party custodians. The circuit court refused to evaluate whether the child's best interests would be served by awarding custody to Lamonte Smith, the boy's father, based on its determination that Smith failed to demonstrate proper cause or change of circumstances. Contrary to the circuit court's ruling, the constitutionally based presumption in favor of a natural parent supplies the threshold showing required

for an evidentiary hearing. Because the circuit court's decision cannot be reconciled with Smith's fundamental constitutional right to the custody of his son, we reverse and remand for further proceedings.

I. BACKGROUND

Davion Frowner was born to Diane Frowner and Lamonte A. Smith in 1999. Smith and Frowner never married, and from the time of his birth, Davion resided with his mother. In 2000, Smith acknowledged paternity and began paying child support. When Diane Frowner died in 2007, intervening plaintiffs, Herbert and Deborah Frowner, Davion's maternal grandparents, took the boy into their home. The Frowners then petitioned the court to be appointed as Davion's guardians. Smith responded by filing a motion for custody. Gaps in the record prevent us from determining why both parties' motions were dismissed by the circuit court.[1] We know only that on August 13, 2008, the parties signed a consent order for custody, parenting time, and child support. The order provided that Smith and the Frowners would jointly share Davion's legal custody, and that the child's "primary residence" would remain with the Frowners "until further order of the Court." The order set forth a parenting-time schedule and confirmed that Smith would continue to pay child support.

In September 2009, Smith moved to change custody. The motion is nowhere to be found in the circuit court record. Apparently the court denied Smith's motion; that order, too, is missing.

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[1] The 2008 motions are not contained in the record, nor is the order appointing a guardian ad litem for the child or the guardian ad litem's report. The record does include an order and a transcript from an entirely unrelated case. The poor condition of the circuit court record has unnecessarily complicated this Court's review.

Smith's third attempt at changing his son's custody resulted in the denial giving rise to this appeal. After Smith again moved for custody, a circuit court referee found unpersuasive his claim that Davion preferred to live with Smith and was doing poorly in school. The referee recommended that Smith's motion be denied because he had "not stated a change of circumstances to warrant reviewing the issue of custody."

Smith filed objections and supplemental objections to the referee's recommendation and requested a de novo hearing. When the hearing commenced, the Frowners' counsel, Sandra Larson, characterized Smith's argument as follows:

> In his objections, [defendant] indicates that, he argues that [as] far as the burden of proving a change of circumstances is not warranted in this case [sic] because the matter involves a third party.
>
> And in addition, he cites the best interest of the child control [sic] and the best interests of the child are better served by residing with the parent rather than a third party.

The trial court then addressed Smith, who represented himself at the hearing:

> *The Court*: Okay. And I note that you filed a motion to change custody. And you have, in fact, stated the law wrong in the state of Michigan.
>
> Once a custody order is established, it cannot be modified, I don't care who the litigants are, absent a proper cause or a change in circumstances that materially affect the welfare of the minor child. That is the burden that you have. Okay?
>
> *Mr. Smith*: Okay.
>
> *The Court*: It does not matter that these parties are not the biological parents because you entered into this consent order in 2008, I believe.
>
> *Ms. Larson*: Correct.

> *The Court*: Okay. So, what you have cited in your motion is that there's a significant change in circumstances because now the minor child has spent a significant amount of time with you, including overnights, and your relationship has improved. Correct? That's what you cited as a change.
>
> And that your son is continuing to have difficulty in school, as he had before, that he's failed the fourth grade and is currently failing the fifth grade while living with the maternal grandparents.
>
> Then you went into the best interest factors. But that's not the issue for the Court. The issue is what is the change in circumstance? You have cited two issues. Your first issue is your son has bonded with you now. Prior to the entry of that judgment, you had not exercised any significant parenting time with your son. Now, you have.
>
> And that he was having issues in school, which you had indicated was an issue for the Court at this time that this matter was originally before the Court. And now, you're indicating that that concern has continued. Correct?
>
> *Mr. Smith*: Yes.

Smith observed that the Frowners had failed to file a response to his motion to change custody. The Frowners' counsel indicated that no response had been filed "to save costs for my client[s] . . . ." On behalf of the Frowners, the attorney requested attorney fees.

Smith argued that the child's school reports demonstrated that the child was not doing well, and provided the court with "progress reports and his grades from January to June of this year, 2011." The court entertained a brief discussion between the parties concerning the child's education. Smith then asserted that as "third parties," the Frowners lacked standing. The circuit court interposed:

> *The Court*: . . . Sir, that's in a regional [sic] custody dispute. It's not, has no bearing on the situation now. The

> child is already in an established custodial environment with the Frowners and you have parenting time, pursuant to the last Court order.
>
> *Mr. Smith*: Well --
>
> *The Court*: . . . That's the law in Michigan. And you should consult with a lawyer if you think it's anything different than that. Trust me, I'm well versed in it.
>
> *Mr. Smith*: I believe you, your Honor. And I respect that.
>
> *The Court*: If I find that there's a proper cause or a change in circumstance to entertain a change in the established custodial environment, I would agree that that then becomes the burden of proof. It's not the burden now.
>
> It's your burden, by clear and convincing evidence, to show me there's a proper cause or change in circumstance. Okay? Do you have anything else to add, sir?

Smith explained that he and the child had formed a bond, and that the boy had also bonded with Smith's older son. Smith pointed out that the child had his own room in Smith's West Bloomfield home and that the West Bloomfield school system "is rated very high." He continued:

> I have a job. I'm educated. I'm a manager at a major corporation. I'm married to my wife, Leslie. We're very strong in the community. We're positive. And I really believe that if the Court grants me sole legal and physical custody, I'm going to be a great father for my son[.]

The circuit court then announced its decision:

> *The Court*: Okay. Thank you. As indicated, the basis of Mr. Smith's motion was that there is a change in circumstance and that he has now developed a strong relationship with his son and that the child is failing in school.
>
> The Court was aware of Mr., [sic] of the minor child's issues in school. That was an issue in the original custody disposition. And despite that, the parties entered into an

agreement on August 13th of 2008, for joint legal custody and primary residence with the maternal grandparents.

Sir, pursuant to [*Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003)], you must demonstrate something other than normal life changes, both good or bad, occurring in the child's life for there to be a proper cause or a change in circumstance.

It would obviously have been assumed that the more time you spent with your son, you were going to have a better and closer bonding relationship with him pursuant to the order of August 13th of 2008. That, in and of itself, would not cause a proper cause or a change in circumstance to even consider the issue of custody at this time.

And the issue of his school grades, which would be significant to this Court, I frankly have conflicting testimony. I have grades through January of '11 indicating he's an all A student, except for a difficulty in math, which is a dramatic improvement over what his grades used to be.

You, obviously, have presented me some information from January to June that he went from an all A situation to some C's and D's in his subjects, which are concerning. However, the Frowners have responded by indicating that they continue your son in educational pursuits and have had him consistently in additional educational classes since June of 2008 and you yourself have not been participating in the cost or help with that.

For those reasons, sir, I am denying your motion. I am not finding a proper cause or a change in circumstance at this time.

II. ANALYSIS

We employ three different standards when reviewing a trial court's decision in a child-custody dispute. We review the trial court's findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error.

Fletcher v Fletcher, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A clear legal error occurs when the trial court "incorrectly chooses, interprets, or applies the law . . . ." *Id*. at 881.

The circuit court clearly erred by imposing on Smith the threshold burden of proving that proper cause or changed circumstances justified a custody hearing. A natural parent possesses a fundamental interest in the companionship, custody, care, and management of his or her child, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, 483 Mich 73, 91-92; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). The United States Supreme Court strongly reaffirmed the constitutional rights of parents in *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000), invalidating a Washington statute permitting a court to order grandparent visitation despite parental opposition. The Supreme Court explained that the Washington statute "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69. The preeminence of a parent's precious right to raise his or her child is so firmly rooted in our jurisprudence that it needs no further explication.

In enacting the Child Custody Act, MCL 722.21 *et seq.*, our Legislature recognized that a parent's right to custody rests on a constitutional foundation. The parental presumption in MCL 722.25(1) codifies the fundamental tenet that, in a custody disagreement between a fit parent and a third party, the fit parent has the advantage:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is

> between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.

In this case we confront the apparent conflict between the parental presumption of MCL 722.25(1) and MCL 722.27(1)(c), which provides for modification of a custodial arrangement only upon a showing of proper cause or change of circumstances.[2]

This Court first acknowledged the tension between MCL 722.25(1) and MCL 722.27(1)(c) in *Heltzel v Heltzel*, 248 Mich App 1, 26-27; 638 NW2d 123 (2001). In that case, a mother sought to regain custody of her child whom she had previously placed in her parents' care. In *Heltzel*, as here, the biological parent had stipulated for the entry of an order in favor of the grandparents' custody. *Id.* at 4-5.

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[2] MCL 722.27 provides, in relevant part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to [MCL 552.605b] until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Unlike in this case, the circuit court in *Heltzel* afforded the parent an evidentiary hearing concerning the child's best interests. *Id.* at 7. In reviewing the evidence produced at the hearing, the circuit court placed on the mother the burden of proving that a change of custody would serve the child's best interests. *Id.* at 13.

This Court reversed, holding that when a "fit natural mother" seeks a change of custody "from an established custodial environment with third persons," the application of a presumption in favor of the custodial environment with the third persons constitutes clear legal error. *Id.* at 23. The *Heltzel* Court specifically addressed the situation presented here:

> We do not believe, however, that the Legislature intended that in every custody dispute between a noncustodial natural parent and a third-person custodian, the third-person custodian could eliminate the fundamental constitutional presumption favoring custody with the natural parent, and thus arrive on equal footing with the parent with respect to their claim of custody to the parent's child, merely by showing that the child had an established custodial environment in the third person's custody. This interpretation . . . fails to take into proper account the parents' fundamental due process liberty interest in childrearing. [*Id.* at 26-27.]

In *Hunter v Hunter*, 484 Mich 247, 263; 771 NW2d 694 (2009), the Supreme Court reaffirmed *Heltzel*'s central holding: "In *Heltzel*, our Court of Appeals recognized *Troxel*'s mandate: In order to protect a fit natural parent's fundamental constitutional rights, the parental presumption in MCL 722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c)." Further, in *Hunter*, 484 Mich at 260, quoting *Heltzel*, 248 Mich App at 27, the Supreme Court adopted the manner in which *Heltzel* resolved the "interplay" of the two presumptions:

> "[C]ustody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person."

"Only when such a clear and convincing showing is made should a trial court infringe the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person." *Heltzel*, 248 Mich App at 27-28.

The purpose of the proper-cause or change-of-circumstances requirement is "to 'erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.' " *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003), quoting *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). But *Heltzel* and *Hunter* instruct that a court may not interpose a presumption in favor of a child's established custodial environment as an obstacle to parental custody. Rather, due regard for Smith's parental rights requires that the circuit court presume him to be the proper caretaker of his child. Enforcing this presumption requires that any opposing presumption, shielding the child from a custodial change absent a showing of proper cause or changed circumstances, must yield. Thus, the circuit court clearly erred by applying MCL 722.27(1)(c) in this case.[3]

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[3] Accordingly, the circuit court misplaced its reliance on *Vodvarka*. Conditioning an evidentiary hearing on a natural parent's ability to prove proper cause or changed circumstances effectively closes the courthouse doors whenever a child thrives in the care of a third party. Taken to its logical conclusion, as long as the status quo is generally

Nor does our jurisprudence countenance the notion that Smith relinquished his fundamental liberty interest in raising his child by stipulating to the order granting custody to the Frowners. This Court has emphatically stated that a parent who voluntarily and temporarily relinquishes custody to foster his or her child's best interests should not suffer a penalty for this election. *Speers v Speers*, 108 Mich App 543, 547; 310 NW2d 455 (1981). Indeed, "[w]e encourage such a practice . . . ." *Theroux v Doerr*, 137 Mich App 147, 150; 357 NW2d 327 (1984). Smith is no less fit to parent because he elected to permit the Frowners to have "primary custody" of the child for a time, during which Smith enjoyed an opportunity to gradually bond with his son. We decline to penalize Smith for stipulating to Davion's custody with the Frowners shortly after the child's mother died.

"We recognize the long-established rule that the best interest of the child is of paramount importance[.]" *Liebert v Derse*, 309 Mich 495, 500; 15 NW2d 720 (1944). Nevertheless, as the Supreme Court emphasized in *Liebert*, "we have never interpreted such rule so as to deprive a parent of the custody of his or her child, unless it was shown that the parent was an unsuitable person to have such custody." *Id.* *Heltzel* and *Hunter* instruct that the presumption in favor of Smith's care and custody of his son protects his right to seek the child's custody despite Davion's established custodial environment with the Frowners. Smith bears no evidentiary burden prerequisite to opening the courtroom doors. As stated by our Supreme Court in *Hunter*, "when these presumptions conflict, the presumption in MCL 722.27(1)(c) must yield to the presumption in

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maintained in the Frowners' home, the circuit court's ruling precludes Smith from ever obtaining custody of his son.

MCL 722.25(1)." *Hunter*, 484 Mich at 264. Because Smith's ability to pursue custody of his child is essential to his constitutional right to parent, the circuit court erred by conditioning Smith's right to enter the pursuit on his establishment of proper cause or a change in circumstances.

Accordingly, we remand to the circuit court for a best-interests hearing to be commenced within 28 days of the issuance of this opinion. The circuit court may award Davion's continuing custody to the Frowners only if it determines that the Frowners have established by clear and convincing evidence that it is not in Davion's best interests under the factors specified in MCL 722.23 for Smith to have custody. To make this showing, the Frowners must prove that " '*all* relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require' " Davion's placement with them rather than Smith. *Hunter*, 484 Mich at 279 (emphasis added; citation omitted).

Reversed and remanded for proceedings consistent with this opinion. We vacate the order awarding attorney fees to the Frowners, and decline to assess costs against either party. We do not retain jurisdiction.

BORRELLO, P.J., and BECKERING, J., concurred with GLEICHER, J.

MORACCINI v CITY OF STERLING HEIGHTS

Docket No. 301678. Submitted March 7, 2012, at Detroit. Decided May 1, 2012, at 9:00 a.m. Leave to appeal denied, 492 Mich 870.

Antonio Moraccini filed an action in the Macomb Circuit Court, alleging that the city of Sterling Heights had negligently maintained a curb cutout within its jurisdiction. Moraccini had been injured when the wheels on his three-wheeled motor scooter struck concrete defects and irregularities in the curb cutout adjacent to a county road. The alleged defects were located at the base of the area where the contractor had chipped or cut out the raised portion of the existing curb to bring the road flush with the sidewalk as required by MCL 125.1361 (sidewalk construction requirements related to persons with disabilities). Sterling Heights moved for summary disposition, arguing that Macomb County was responsible because the fall was the result of a defect in the curb and gutter portion of Macomb County's roadway and that Sterling Heights was thus entitled to governmental immunity. The court, John C. Foster, J., denied the motion. Sterling Heights appealed.

The Court of Appeals *held*:

1. A governmental agency can be held liable under the governmental tort liability act, MCL 691.1401 *et seq.*, if an action falls into one of the enumerated exceptions to governmental immunity, including the highway exception. Read together, MCL 691.1402(1), as amended by 1999 PA 205, and MCL 691.1402a, as amended by 1999 PA 205, effectively granted municipalities jurisdiction over sidewalks adjacent to a county highway for purposes of repair, maintenance, and any associated liability and mandated that they maintain them in reasonable repair. The highway exception to governmental immunity applies if (1) the municipality knew, or in the exercise of reasonable diligence should have known, of the existence of the defect in a sidewalk, trailway, crosswalk, or other installation outside the improved portion of the highway designed for vehicular travel and (2) the defect was the proximate cause of the injury, death, or damage.

2. The circuit court correctly determined that Moracinni could assert the highway exception to governmental immunity, MCL

691.1402, and properly denied Sterling Heights summary disposition. The cutout abutted the county highway and qualified as a sidewalk under the general statutory definition of "highway" in MCL 691.1401(e) and as an installation for purposes of MCL 691.1402a(1). The curb cutout was not an improved portion of the highway designed for vehicular travel, it constituted a path for pedestrians that was designed to facilitate pedestrian use by persons with physical disabilities, and it qualified as part or an extension of a sidewalk because it was designed to make pedestrian travel easier for all individuals.

Affirmed.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — SIDEWALKS — CURB CUTOUTS.

Municipalities effectively have jurisdiction over sidewalks adjacent to a county highway for purposes of repair, maintenance and associated liability and must maintain them in reasonable repair; the highway exception to governmental immunity applies if (1) the municipality knew, or in the exercise of reasonable diligence should have known, of the existence of the defect in a sidewalk, trailway, crosswalk, or other installation outside the improved portion of the highway designed for vehicular travel and (2) the defect was the proximate cause of an injury, death, or damage; a curb cutout adjacent to a county highway qualifies as a sidewalk under the general statutory definition of "highway" and as an installation for purposes of the highway exception (MCL 691.1401[e]; 691.1402[1], as amended by 1999 PA 205; 691.1402a[1], as amended by 1999 PA 205).

Ishbia & Gagleard, P.C. (by *Michael A. Gagleard* and *Michelle S. Toma*), for Antonio Moraccini.

O'Reilly Rancilio P.C. (by *Lauren DuVal Donofrio*) for the city of Sterling Heights.

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

MURPHY, C.J. Defendant, the city of Sterling Heights, appeals as of right an order denying its motion for summary disposition in this tort liability action concerning an injury sustained by Antonio Moraccini that was allegedly caused by defects in a city sidewalk. The city asserted

governmental immunity as an affirmative defense and argued that the alleged defects pertained to a highway curb, not a sidewalk, which therefore fell within the jurisdiction of the county and not the city for purposes of the highway exception to governmental immunity, MCL 691.1402. We affirm, holding as a matter of law that, under MCL 691.1402a(1),[1] the site of the alleged defects constituted a portion of a county highway, i.e., part of an abutting sidewalk or other installation, existing outside the improved portion of the county highway designed for vehicular travel. Accordingly, the city is potentially liable under MCL 691.1402a, and the summary disposition motion was properly denied.

Plaintiff, Antonio Moraccini, alleged that he was operating his three-wheeled motorized scooter when the wheels of the scooter struck concrete defects and irregularities, catapulting him from the scooter to the ground and causing severe injuries. Moraccini described the concrete where the scooter's wheels became jammed as being uneven, damaged, and unstable, with deep cracks and crevices. Moraccini had been traveling down a sidewalk on the scooter and was about to cross a road, which indisputably fell within the jurisdiction of the county, when the accident occurred. The sidewalk was constructed by the city in 1977, and the contractor who built the sidewalk chipped or cut out the raised portion of the existing curb to bring the road flush with the sidewalk as required by MCL 125.1361.[2] The alleged defects were located at the base of the area comprising the curb cutout.

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[1] MCL 691.1402a was amended by 2012 PA 50, effective March 13, 2012. The amended version of the statute, which limits its application solely to "a sidewalk . . . installed adjacent to a municipal, county, or state highway," is not applicable here, considering the effective date of the amendment and the earlier date of the incident.

[2] MCL 125.1361 provides in relevant part:

Moraccini filed suit, alleging negligence and asserting that the city had failed to keep the sidewalk in reasonable repair so as to make it reasonably safe and convenient for public travel. The city answered, alleging, in part, that it was shielded by governmental immunity. The city subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by immunity) and (10) (no genuine issue of material fact). The city conceded that it had jurisdiction over the sidewalk and was required to keep the sidewalk in reasonable repair. The city contended, however, that discovery had shown that Moraccini "fell as a result of an alleged defective condition in the curb and gutter portion of Macomb County's roadway . . . ." The city argued that the county had jurisdiction over the road and the area of the curb cutout and that the sidewalk did not include the curb cutout. Therefore, according to the city, the defective-highway exception to governmental immunity, MCL 691.1402, did not apply. Moraccini countered that the curb cutout was part of the sidewalk, thereby making it the city's responsibility under MCL 691.1402. The trial court agreed with Moraccini and denied the city's motion for summary disposition, ruling that it was "persuaded that the area in question served as an extension of the sidewalk, particularly since there [was] no evidence that it was used for vehicular traffic."

A sidewalk constructed or reconstructed after April 12, 1973 on public or private property for public use within this state, whether constructed by a public agency or a person, firm, corporation, nonprofit corporation, or organization, shall be constructed in a manner that will facilitate use by persons with physical disabilities. At points of intersection between pedestrian and motorized lines of travel, and at other points when necessary to avoid abrupt changes in grade, a sidewalk shall slope gradually to street level so as to provide an uninterrupted line of travel.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). MCR 2.116(C)(7) provides for summary disposition when a claim is "barred because of . . . immunity granted by law . . . ." The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* We must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id.* But when a relevant factual dispute does exist, summary disposition is not appropriate. *Id.*

Except as otherwise provided, the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., broadly shields and grants to governmental agencies immunity from tort liability when an agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011); *Grimes v Dep't of Transp*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). "The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a

plaintiff to pursue a claim against a governmental agency." *Duffy*, 490 Mich at 204. A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions. *Grimes*, 475 Mich at 77; *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. *Id.* at 614. "A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Odom*, 482 Mich at 478-479.

At the relevant time, the highway exception to governmental immunity provided in pertinent part:

> *Except as otherwise provided in* [*MCL 691.1402a*], each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the

> highway designed for vehicular travel. [MCL 691.1402, as amended by 1999 PA 205 (emphasis added).][3]

At the time of the incident, "highway" was statutorily defined as "a public highway, road, or street that is open for public travel and includes bridges, *sidewalks*, trailways, crosswalks, and culverts on the highway [and it] . . . does not include alleys, trees, and utility poles." MCL 691.1401(e), as amended by 2001 PA 131 (emphasis added).[4] MCL 691.1402(1) imposed a general duty on municipalities to keep sidewalks under their jurisdiction in reasonable repair. *Jones v Enertel, Inc*, 467 Mich 266, 268; 650 NW2d 334 (2002). "[W]hile MCL 691.1402(1) exempts state and county road commissions from liability for injuries resulting from defective sidewalks, municipalities are not exempt; municipalities do have a duty to maintain sidewalks in reasonable repair." *Robinson v City of Lansing*, 486 Mich 1, 7; 782 NW2d 171 (2010). "[W]hen MCL 691.1402(1) and MCL 691.1401(e) [definition of highway] are read together, it is clear that all governmental agencies except the state and county road commissions have a duty to maintain sidewalks in reasonable repair." *Id.* at 8.

As indicated in the prefatory language of MCL 691.1402(1), the statute applied except as otherwise provided in MCL 691.1402a. In relevant part, MCL 691.1402a(1) previously provided:

> Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is

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[3] Unless otherwise indicated, all references to MCL 691.1402 are to the statute as amended by 1999 PA 205, the version in effect at the time of the incident.

[4] The amendments of this provision by 2012 PA 50 are only stylistic in nature. Unless otherwise indicated, all references to MCL 691.1401 are to the statute as amended by 2001 PA 131, the version in effect at the time of the incident.

> not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
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> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
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> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.[5]

We hold that MCL 691.1402a, in conjunction with MCL 691.1402(1), governs the proper analysis of this case. The location where the accident took place was subject to the general authority and control of Macomb County, which is the reason that the county had to grant a permit to the city to allow installation of the sidewalk.[6] However, MCL 691.1402a(1) made it abun-

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[5] MCL 691.1402a(1), as added by 1999 PA 205. Subsection (2) of the statute contained the two-inch rule. MCL 691.1402a(2); see generally *Robinson*, 486 Mich at 10, 13 (noting that a municipality is not liable for damages arising from a depression in a sidewalk that does not exceed 2 inches in depth). Subsection (3) of the statute contained a liability limitation pertaining to off-road recreational vehicles (ORVs). MCL 691.1402a(3); *Robinson*, 486 Mich at 11 n 9 (recognizing that municipalities are not liable for injuries resulting from the use of off-road vehicles absent gross negligence). Unless otherwise indicated, all references to MCL 691.1402a are to the statute as added by 1999 PA 205, the version in effect at the time of the incident.

[6] There was documentary evidence indicating that in 1974, the Macomb County Road Commission granted the city a "permit to contract, operate, use and/or maintain within the right-of-way." The permit allowed the city to install sidewalks. Under the permit, the city was required to operate and maintain the sidewalks it installed. As stated earlier, in 1977 the city hired a contractor who installed the sidewalk and created the curb cutout.

dantly clear that a municipal corporation[7] can nonetheless be held liable, upon satisfaction of the knowledge and proximate cause provisions, for a failure to repair or maintain that "portion of a county highway *outside of the improved portion of the highway designed for vehicular travel*, including a sidewalk . . . or other installation." (Emphasis added.) Thus, there was a general duty of municipal corporations to repair and maintain the areas subject to the enumerated conditions, effectively giving municipal corporations jurisdiction for purposes of repair, maintenance, and any associated liability.[8]

MCL 691.1402a and its relationship to MCL 691.1402(1) were examined in *Robinson*, 486 Mich at 11-13, 22, wherein the Court stated:

> Although the very first sentence of MCL 691.1402a(1) begins by stating that a municipality is *not* liable for injuries arising from a portion of a county highway outside the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation, this sentence is prefaced by the language "[e]xcept as otherwise provided by this section," and the very next sentence of this subsection states that a municipality *is* liable for such injuries under certain circum-

[7] A "municipal corporation" was defined as "a city, village, or township or a combination of 2 or more of these when acting jointly." MCL 691.1401(a). Accordingly, the city is a municipal corporation for purposes of MCL 691.1402a(1).

[8] On the issue of jurisdiction in relationship to governmental immunity, this Court in *Carr v City of Lansing*, 259 Mich App 376, 381; 674 NW2d 168 (2003), observed:

> A governmental agency must have jurisdiction over a highway for it to be liable under the highway exception for breaching its duty to maintain a highway "in reasonable repair so that it is reasonably safe and convenient for public travel." An agency has jurisdiction when it has control over the highway. . . . [O]nly one agency may have jurisdiction for purposes of liability under the highway exception . . . . [Citations omitted.]

> stances. That is, a municipality *is* liable for injuries arising from a defective sidewalk adjacent to a county highway if (a) the municipality knew or should have known at least 30 days before the occurrence of the injury of the existence of the defect in the sidewalk and (b) that defect was a proximate cause of the injury. MCL 691.1402a(1). In addition, MCL 691.1402a(2) provides that a discontinuity defect of less than 2 inches creates a rebuttable inference that the municipality maintained the sidewalk in reasonable repair, as is required by MCL 691.1402(1); this is the statutory two-inch rule.
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> As discussed earlier, MCL 691.1402(1) imposes liability on municipalities for injuries resulting from defective sidewalks, i.e., sidewalks that the municipality has failed to maintain in reasonable repair. However, MCL 691.1402a limits this liability by providing that municipalities are only liable for injuries resulting from defective sidewalks adjacent to *county* highways under the specified circumstances. . . . [W]hen MCL 691.1402(1) and MCL 691.1402a are read together, it is clear that municipalities are generally liable for injuries resulting from defective sidewalks.
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> . . . MCL 691.1402a does not apply to sidewalks adjacent to highways other than county highways, such as sidewalks adjacent to state highways. [Citations omitted.]

In this case, the area in dispute is adjacent to and abuts a county highway, and while *Robinson* concerned a sidewalk, MCL 691.1402a(1) also spoke of "other installation[s]" outside the improved portion of the highway designed for vehicular travel.

MCL 691.1402a, which was added by 1999 PA 205, and took effect December 21, 1999, was enacted to limit municipal liability relative to injuries occurring caused by defective sidewalks, trailways, crosswalks, and other installations located within portions of a county highway, because the county's liability was limited under

MCL 691.1402(1) to improved portions designed for vehicular traffic and caselaw had developed that imposed broad liability on municipalities for such defects in the remaining portions of the county highway. In *Listanski v Canton Twp*, 452 Mich 678, 681; 551 NW2d 98 (1996), a case predating MCL 691.1402a, our Supreme Court addressed the issue "whether townships can be held liable under MCL 691.1402 . . . for injuries occurring on public sidewalks abutting county roads within the townships' boundaries." The Court held "that townships have jurisdiction over public sidewalks located along county roads within the township sufficient to support a cause of action against the township under the highway exception for failure to maintain them in reasonable repair." *Id.* at 682.[9] The *Listanski* Court reasoned and concluded:

> After analyzing the Michigan Constitution, statutes, and common law on this issue, we believe that the Legislature intended municipalities to retain reasonable control over sidewalks within their boundaries, as long as the control pertains to local concerns and does not interfere with the state or counties' control over their highways. . . . [O]ur conclusion is consistent with public policy and the overall legislative scheme. It treats townships *the same as cities*, and ensures that those persons injured on township sidewalks abutting a county road are not within the only class of persons without a remedy against a governmental agency. Because we believe the Legislature intended townships to be subject to liability for injuries occurring as a result of a failure to maintain sidewalks within their

[9] We also note *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 136 n 6; 523 NW2d 791 (1994), in which the Court stated that the purpose behind the language in MCL 691.1402(1), which limited the state and counties' liability to defects in the improved portion of a highway designed for vehicular travel, "is to allocate responsibility for sidewalks and crosswalks to local governments, including townships, cities, and villages."

> boundaries, we would remand these cases to their respective circuit courts for trial. [*Id.* at 690-691 (emphasis added).][10]

Subsequently, the Legislature enacted MCL 691.1402a, and we note for historical background purposes the following commentary in House Legislative Analysis, HB 4010, January 4, 2000, with respect to the proposed act:

> The statute [MCL 691.1402] does not directly address the liability of local governments for sidewalks, etc. alongside . . . county roads, but the courts have rendered decisions on the matter. . . . [I]n a recent decision, Listanski v Canton Township (1996), the Michigan Supreme Court said townships are liable for injuries occurring on sidewalks abutting county roads within their boundaries. This decision overturned a court of appeals decision saying townships were not liable because they lack sufficient jurisdiction. (Townships must seek approval from the county in order to construct, repair, or maintain sidewalks along county roads.) The state supreme court said its decision, "treats townships the same as cities, and ensures that those persons injured on township sidewalks abutting a county road are not within the only class of persons without a remedy against a government agency." Legislation has been introduced to address the liability of municipalities for "installations" alongside county roads.
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> The bill would provide protection to townships, cities, and villages against "slip and fall" and similar lawsuits on sidewalks, bikepaths, trailways, and similar installations

[10] The *Listanski* Court also observed, "Additionally, there is no reason in logic or policy for the Legislature to have . . . retained city responsibility to repair and maintain sidewalks along city roads, but eliminated city and township responsibility for repair and maintenance of sidewalks along state or county roads." *Listanski*, 452 Mich at 687 n 10 (citation omitted).

> along the side of county highways. It limits liability to instances in which [knowledge, causation, and two-inch rule provisions are set forth][.]

With respect to MCL 691.1402a(1), the question that must be answered in the case at bar is whether the concrete base of the area comprising the so-called curb cutout (hereafter simply referred to as the "curb cut-out") constituted a portion of the county highway falling outside the improved portion of the highway designed for vehicular travel, which includes sidewalks or other installations. We initially conclude that the curb cutout was not an improved portion of the highway designed for vehicular travel. Clearly, the curb cutout was designed to make pedestrian travel easier for all individuals, not for ease in vehicular travel. We shall, however, review a couple of cases addressing curbs in general.

In *Meek v Dep't of Transp*, 240 Mich App 105, 113; 610 NW2d 250 (2000), a highway-design-defect case, this Court held that a "barrier curb must be considered part of the improved portion of the highway designed for vehicular travel and comes within the highway exception to governmental immunity." The *Meek* panel, in support of its holding, relied on *Gregg v State Hwy Dep't*, 435 Mich 307, 314-315; 458 NW2d 619 (1990), in which our Supreme Court ruled that a highway shoulder is part of the improved portion of the highway designed for vehicular travel. *Meek*, 240 Mich App at 114. However, in *Grimes*, 475 Mich at 84, the Michigan Supreme Court "overrule[d] *Gregg* and *its progeny* to the extent that they can be read to suggest that a shoulder is 'designed for vehicular travel.' "[11] (Empha-

[11] We note that *Meek* was also effectively overruled by *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502; 638 NW2d 396 (2002), which held that the highway exception to governmental immunity "does

sis added.) The *Grimes* Court held that "only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." *Id.* at 91. The curb cutout here was not part of the highway's travel lanes. Accordingly, *Meek* cannot serve as a basis to reject our conclusion that the curb cutout does not constitute an improved portion of the highway designed for vehicular travel.

In *Sharp v Benton Harbor*, 292 Mich App 351; 806 NW2d 760 (2011), the plaintiff stepped onto a curb that abutted a city street and the curb allegedly crumbled, causing the plaintiff to fall to the ground.[12] The plaintiff sued the defendant, the city of Benton Harbor, which acknowledged jurisdiction over the curb. In a motion for summary disposition, Benton Harbor argued that the curb did not come within the definition of "highway." *Id.* at 352. This Court held that a curb falls under the statutory definition of "highway" and "that governmental immunity does not bar a claim against a municipality arising from a defective curb." *Id.* at 357. The Court concluded "that the curb framing [the] [s]treet constitutes an integral part of the road, and that Benton Harbor bore responsibility for maintaining . . . [the] curb in reasonable repair." *Id.* at 358. We note that *Sharp* dealt with a curb that "was neither at the corner nor within a crosswalk" and that "[a] grass verge separated the curb from the sidewalk." *Id.* at 352. We additionally note that the abutting road in *Sharp* was not a county roadway, but a city street. *Sharp* did not address MCL 691.1402a, as an abutting county road

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not include a duty to design, or to correct defects arising from the original design or construction of highways."

[12] A "curb" is defined in the dictionary as " 'a rim, [especially] of joined stones or concrete, along a street or roadway, forming an edge for a sidewalk.' " *Sharp*, 292 Mich App at 356, quoting *The Random House Dictionary of the English Language, Second Edition Unabridged*.

was not at issue, nor did the panel, as expressly indicated, have to concern itself with whether the curb was part of the improved portion of the highway designed for vehicular travel, given that the defendant was not a county or the state. *Id.* at 353. *Sharp* does lend support for the proposition that a curb cutout falls within the general definition of "highway."

Having concluded that the curb cutout did not constitute an improved portion of the county highway designed for vehicular travel, the final question to be answered is whether the curb cutout otherwise qualified as a portion of the county highway under MCL 691.1402a(1), i.e., whether it constituted an abutting "sidewalk, trailway, crosswalk, or other installation." The curb cutout abutted the county highway, and we believe that it falls within the definition of "highway" pursuant to *Sharp* and that it also constituted an "installation" for purposes of MCL 691.1402a(1). An "installation" is defined as "something installed, as machinery or apparatus placed in position or connected for use." *Random House Webster's College Dictionary* (2001). While we have a fairly unique set of circumstances in which the original curb was simply cut into, as opposed to the common situation in which a curb and sidewalk are designed, poured, and constructed to flow together in order to accommodate pedestrian traffic, there remains a concrete base, or remnants thereof, that fits within the broad definition of an "installation" and that is comparable in kind, character, and nature to a sidewalk, crosswalk, or trailway. See *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004) ("Under the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.' ") (citation omitted).

Just like a sidewalk, crosswalk, and trailway, a curb cutout is an area, and part of a pathway or walkway, that is traversed by pedestrians, and to the extent that a full curb might be considered an obstacle to the flow of pedestrian traffic, the curb itself does not exist for purposes of a curb cutout. The goal in removing or not constructing sections of curb in areas where sidewalks abut roadways is to create obstacle-free, level walkways for pedestrians. Curb cutouts are specifically designed for pedestrian traffic and, contrary to the city's argument, they are not comparable to highway shoulders, which are neither designed nor intended for pedestrian travel, despite occasional use by pedestrians, often in emergency situations.[13] Moreover, we also find that the curb cutout qualified as a "sidewalk" for purposes of the general definition of "highway" and in relationship to the term's use in MCL 691.1402a(1).

"[A] sidewalk is a path for pedestrians along the side of a road." *Hatch v Grand Haven Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000).[14] We conclude that the curb

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[13] The city argues that a "short curb" still exists in the curb cutout areas at issue, noting lines of demarcation that are generally present in the concrete. Even were we to use the terminology "short curb," it would not change our analysis, given that the area, regardless of its moniker, is designed and used for pedestrian traffic. As such, a "short curb" constitutes an "installation" for purposes of the former version of MCL 691.1402a, as it is similar to a sidewalk, crosswalk, and trailway.

[14] The Court cited with approval definitions of "sidewalk" set forth by this Court in *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363, 367; 579 NW2d 374 (1998), which included "a path for pedestrians, usually paved, along the side of a street," a "walk or raised path for pedestrians," and "part of a public street or highway designed for the use of pedestrians." *Hatch*, 461 Mich at 462 (citations and quotation marks omitted). We note that with the enactment of 2012 PA 50, the Legislature specifically added a definition of "sidewalk," which provides that "sidewalk" means "a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel." MCL 691.1401(f), as amended by 2012 PA 50.

cutout where the alleged defects existed was part or an extension of the sidewalk, given that it constituted a path for pedestrians and was designed and intended to be used by pedestrians. The whole purpose behind curb cutouts is to facilitate pedestrian use "by persons with physical disabilities." MCL 125.1361. As indicated earlier, MCL 125.1361 provides that "[a]t points of intersection between pedestrian and motorized lines of travel, . . . a sidewalk shall slope gradually to street level so as to provide an uninterrupted line of travel." Absent a curb as mandated by MCL 125.1361, a sidewalk would naturally extend to the motorized line of travel, encompassing the area where the curb was formerly located or where it typically would be located. A curb cutout is conducive, and is intended to be conducive, to pedestrian travel, and it qualifies as part or an extension of the sidewalk.

Whether constituting a sidewalk or an installation, or a combination thereof, the curb cutout was indeed a portion of the county highway not designed for vehicular travel, thereby falling within the parameters of MCL 691.1402a(1).

With respect to whether the city knew or should have known about the alleged defects 30 days before the occurrence, whether the alleged defects were the proximate cause of plaintiff's injuries, and whether the statutory two-inch rule has any application, MCL 691.1402a(1) and (2), these are all matters outside the scope of this appeal and may be raised by the city in the trial court.

Affirmed. Having prevailed in full, plaintiff is awarded taxable costs pursuant to MCR 7.219.

HOEKSTRA and MURRAY, JJ., concurred with MURPHY, C.J.

PEOPLE v ACOSTA-BAUSTISTA

Docket No. 303015. Submitted April 10, 2012, at Lansing. Decided May 1, 2012, at 9:05 a.m.

Valeriano Acosta-Baustista was charged in the 55th District Court with a violation of MCL 257.904(4), which makes it a felony for a person to cause the death of another person while operating a motor vehicle in violation of MCL 257.904(1). MCL 257.904(1) provides that the following may not operate a vehicle upon the public highways or other places open to the general public or generally accessible to motor vehicles: (1) a person whose operator's license has been suspended or revoked, (2) a person whose application for a license has been denied, or (3) a person who has never applied for a license. Defendant, an illegal alien, was operating a truck with an expired Mexican-issued license when he struck another vehicle, resulting in that driver's death. There was no allegation that defendant was negligent. The court, Donald L. Allen, Jr., J., determined that there was probable cause to believe that defendant was guilty of violating MCL 257.904(4) and bound defendant over to the Ingham Circuit Court. The circuit court, William E. Collette, J., reversed the district court's order, quashed the bindover, and ordered that the charge be dismissed. The prosecution appealed.

The Court of Appeals *held*:

1. MCL 257.904(1) and (4) do not apply to or penalize a person driving a motor vehicle with a valid, but recently expired license that was never suspended or revoked. The limiting language in MCL 257.904(4) exempts from its penalties a person whose motor vehicle operator's or chauffer's license was suspended because that person failed to answer a citation or comply with an order or judgment and makes clear that the statute is to be applied to persons whose licenses were suspended because of unsafe or illegal driving, not those whose licenses were suspended for administrative reasons unrelated to their driving records.

2. Pursuant to articles VI and VII of the Convention on the Regulation of Inter-American Automotive Traffic 1943, the United States and Mexico have reciprocity with each other so that a person licensed in one country is allowed to operate a motor

vehicle in the other country while using that foreign license. A person's immigration status does not affect the driving privileges afforded by the convention or the manner in which MCL 257.904(4) is applied. MCL 257.904(4) applies equally regardless of whether the motor vehicle operator is driving pursuant to a license from Michigan, a foreign country that is a signatory to the convention, or one of the other 49 states. To hold otherwise would necessitate making an improper policy decision. The circuit court properly quashed the bindover and ordered the charge dismissed because the evidence did not demonstrate probable cause that defendant violated MCL 257.904(4)

Affirmed.

1. CRIMINAL LAW — MOTOR VEHICLES — EXPIRED LICENSE — OPERATION OF MOTOR VEHICLES WITH SUSPENDED OR REVOKED DRIVER'S LICENSE.

Under MCL 257.904(1) and (4), a person whose motor vehicle operator's license has been suspended or revoked, a person whose application for a license has been denied, or a person who has never applied for a license is guilty of a felony if he or she operates a motor vehicle on the public highways or other places open to the general public or generally accessible to motor vehicles and by that operation causes the death of another person; MCL 257.904(1) and (4) do not apply to or penalize a person driving a motor vehicle with an expired license.

2. CRIMINAL LAW — MOTOR VEHICLES — EXPIRED LICENSE — FOREIGN LICENSE.

Pursuant to articles VI and VII of the Convention on the Regulation of Inter-American Automotive Traffic 1943, the United States and Mexico have reciprocity with each other so that a person licensed in one country is allowed to operate a motor vehicle in the other country while using that foreign license; a person's immigration status does not affect the driving privileges afforded by the convention or the application of MCL 257.904(1) and (4), which prohibit operating a motor vehicle with a suspended or revoked license or without having applied for a license and by that operation causing another's death.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, and *Joseph B. Finnerty*, Appellate Division Chief, for the people.

Jonathon Toby White, PLC (by *Stephanie R. Farman*), for defendant.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM. The prosecution appeals as of right the circuit court order granting defendant's motion to quash his bindover after the district court found that there was probable cause to believe that defendant was guilty of operating a vehicle in violation of MCL 257.904(4). The circuit court held that there was no probable cause and ordered that the charge be dismissed. Because we conclude that the plain language of MCL 257.904(4) does not include persons driving with an expired license, we affirm.

This case arises from a fatal automobile accident. On September 3, 2009, the driver's side door of Adam Nevells's automobile was struck by a pickup truck driven by defendant as Nevells pulled out of the Okemos High School parking lot onto Jolly Road. Nevells died as a result of the injuries he received in the crash; he was the only occupant of the vehicle. It was later determined by police that defendant had the right of way and that defendant's effort to stop before striking Nevells's vehicle left a 30-foot skid mark on the road leading to the crash site. No negligence on defendant's part was alleged. It was also not disputed that defendant possessed an operator's license originating in Mexico that had expired on May 27, 2009.

Defendant was charged with violating MCL 257.904(4), which makes it a felony offense for a person who has never applied for a license or a person with a suspended or revoked license to operate a motor vehicle and by that operation cause the death of another person. A preliminary examination was held on December 2, 2010. On the basis of the evidence establishing the facts discussed earlier, the district court concluded that there was probable cause to bind defendant over for a felony trial.

In the circuit court, defense counsel moved to quash the bindover on the ground that defendant did not violate MCL 257.904 because there was no evidence that he had been driving on a suspended or revoked license or that he had failed to apply for a license or been denied one. Defense counsel stressed that Mexico and the United States have an agreement whereby each country honors a license issued by the other. The reciprocity between Mexico and the United States in this regard is not disputed by the parties on appeal. The relevant reciprocity agreement is set forth in articles VI and VII of the Convention on the Regulation of Inter-American Automotive Traffic 1943.

Defense counsel alternatively argued in the circuit court that there was insufficient evidence to show proximate causation. In response, the prosecutor argued that defendant was in violation of MCL 257.904 because he had no valid license and additionally urged the circuit court to interpret MCL 257.904 as imposing strict liability on the causation element. The circuit court agreed with defendant on both grounds and ordered that the charge against him be dismissed. This appeal ensued.

On appeal, regarding defendant's license status, the prosecution argues that the circuit court erred by dismissing the charge because the evidence was sufficient to establish probable cause that defendant was in violation of MCL 257.904(4).

The issues raised in this case require that we interpret MCL 257.904. We review de novo issues of statutory interpretation. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007). "The purpose of statutory interpretation is to give effect to the intent of the Legislature." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). If a statute is clear, it must be enforced as written. *Id.*

When interpreting a statute, we do not speculate about the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). "Nothing will be read into a clear and unambiguous statute that is not within the manifest intent of the Legislature as derived from the language of the statute itself." *People v Miller*, 288 Mich App 207, 210; 795 NW2d 156 (2010). Accordingly, the statutory language itself is the best indicator of the statute's scope. *Id*.

Defendant was charged with a violation of MCL 257.904(4), which provides in pertinent part: "A person who operates a motor vehicle in violation of subsection (1) and who, by operation of that motor vehicle, causes the death of another person is guilty of a felony . . . ." MCL 257.904(1) provides:

> A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in [MCL 257.212] of that suspension or revocation, whose application for [a] license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.

We observe that MCL 257.904(1) is carefully worded to identify precisely what licensing deficiencies are punishable. The plain language of the statute applies to persons who never apply for a license or who obtain one but subsequently have the license suspended or revoked because of improper driving. In the first instance, the person has never been adjudged fit to drive. In the second instance, the person has specifically been adjudged unfit to drive. In contrast, a person with a valid license who has simply let it lapse is a person adjudged fit to drive who has merely failed to keep up the related paperwork.

MCL 257.904(1) and (4) apply to and penalize a person whose operator's license "has been suspended or revoked," a person "whose application for [a] license has been denied," or a person "who has never applied for a license." Defendant's status as a person driving on a valid but recently expired license is not included in the plain statutory language. The fact that defendant's license was never suspended or revoked was not contested; further, it was not contested that defendant never applied for a Michigan driver's license and was never denied a driver's license for which he did apply. Rather, defendant had applied for and was granted a Mexican driver's license.

The language in MCL 257.904(4) is instructive because it exempts from its penalties "a person whose operator's or chauffeur's license was suspended because that person failed to answer a citation or comply with an order or judgment . . . ." This language limits the application of the statute to persons driving on licenses that were suspended because of unsafe or illegal driving, not merely those suffering suspension for administrative reasons unrelated to their driving records. For these reasons, we conclude that MCL 257.904(1) does not include licensed drivers whose licenses have merely expired, and accordingly, we conclude that the penalties of MCL 257.904(4) do not apply to persons driving with expired licenses.

The prosecution does not directly disagree with this interpretation of MCL 257.904(4). Instead the prosecution focuses its argument on an interpretation predicated on defendant's status as an illegal alien. Specifically, the prosecution argues that defendant is in violation of the statute because he never applied for a Michigan driver's license and, as an illegal alien, defendant would not be entitled to a Michigan driver's license

if he were to apply for one. Accordingly, the prosecution argues, defendant is a person "who never applied for a license" in violation of MCL 257.904(1) and is consequently subject to MCL 257.904(4).

Defendant responds by asserting that the prosecution's argument fails because pursuant to the Convention on the Regulation of Inter-American Automotive Traffic 1943, defendant was not required to apply for a Michigan driver's license because his Mexican license is recognized in Michigan. The prosecution asserts that the convention does not excuse defendant from his failure to apply for a Michigan license because he was in the United States illegally and, consequently, should not be extended the privilege of driving set forth in the convention. According to the prosecution, because defendant cannot rely on the convention for lawful driving privileges in Michigan, he was required to obtain a Michigan driver's license and his failure to apply for one subjects him to prosecution pursuant to MCL 257.904(1) as a person who has "never applied."

We are not persuaded by the prosecution's attempt to draw a distinction on the basis of an individual's immigration status in regard to the privileges extended by the Convention on the Regulation of Inter-American Automotive Traffic 1943 and the application of MCL 257.904. First, we observe that the prosecution cites no authority to support its position that defendant's immigration status affects whether he may be prosecuted under MCL 257.904. Moreover, the prosecution admits that the convention is silent with respect to immigration status. Similarly, MCL 257.904 does not make any reference to, let alone a distinction, regarding driving privileges based on immigration status. There simply is no statutory language or case authority to support the

prosecution's contention that defendant's immigration status is a relevant consideration regarding the application of MCL 257.904.

Under these circumstances, the prosecution is urging us to impose a policy decision regarding the application of MCL 257.904 to illegal aliens. Because there is no basis either in law or in the language of the statute to hold that immigration status is relevant to the application of MCL 257.904, accepting the prosecution's argument would constitute our making a policy decision, which is a function reserved to the Legislature. *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999) (" 'Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute.' ") (citations omitted).

Therefore, we conclude that the plain language of the statute and the convention support a finding that the reasoning underlying MCL 257.904(1) and (4) is not affected by the motor vehicle operator's immigration status and will remain the same regardless of whether the motor vehicle operator is driving pursuant to a license from Michigan, a foreign country that is a signatory to the convention, or one of the other 49 states.

The evidence presented at the preliminary hearing established that defendant was driving on a Mexican-issued license as permitted by the convention, and the fact that defendant's license was expired at the time of the accident does not make MCL 257.904 applicable. Consequently, the circuit court did not err when it granted defendant's motion to quash the bindover

because this evidence does not demonstrate probable cause to believe that defendant is guilty of violating MCL 257.904(4).[1]

Affirmed.

HOEKSTRA, P.J., and SAWYER and SAAD, JJ., concurred.

[1] In light of our resolution of this issue, we need not reach the question of causation.

PEOPLE v SMITH-ANTHONY

Docket No. 300480. Submitted December 13, 2011, at Detroit. Decided May 3, 2012, at 9:00 a.m. Leave to appeal granted, 493 Mich 879.

Chandra Valencia Smith-Anthony was convicted by a jury in the Oakland Circuit Court of larceny from the person, MCL 750.357, and was sentenced to a term of 4 to 20 years in prison by the court, Michael D. Warren, Jr., J. While monitoring closed-circuit television for Macy's in the Northland Mall, the store's loss-prevention detective observed defendant acting suspiciously while shopping and proceeded to follow defendant while keeping her within visual range. The loss-prevention detective saw defendant select a perfume box set from a display and slip it into one of her bags. The detective overheard defendant decline help from sales associates and verified that she had not paid for the fragrance. Defendant appealed.

The Court of Appeals *held*:

To establish larceny from a person, the prosecution must prove beyond a reasonable doubt (1) the taking of someone else's property without consent, (2) movement of the property, (3) the intent to steal or permanently deprive the owner of the property, and (4) that the property was taken from the person or the person's immediate area of control or immediate presence. The crime of theft from the person is an aggravated offense because it is a crime against both a person and a person's property rights. Punishment for a conviction of larceny from the person is enhanced over that for a simple larceny because violating a person's privacy or personal space could result in a violent confrontation. The prosecution failed to present sufficient evidence to support defendant's conviction of larceny from the person. There was no evidence that the loss-prevention detective ever possessed the perfume box or that it was in the detective's immediate presence or control when defendant pushed the box into her bag or at any other point during the larceny. Larceny from the person is not accomplished if the victim and the perpetrator are merely in sight or hearing range of each other.

Reversed.

WHITBECK, J., dissenting, stated that viewing the testimony in a

light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction because defendant was in the loss-prevention detective's immediate area of control or immediate presence when defendant took the box and stuffed it into her bag. The loss-prevention detective, as the employee responsible for protecting the store's property, had a right to possess the property that was superior to defendant's unless she paid for it. The prosecution did not have to prove that the victim—the detective—owned the property, only that the detective's right was superior to defendant's. The loss-prevention detective's testimony established that the detective was close enough to see defendant commit the larceny and hear defendant speak to other employees, and thus that defendant was as a matter of law within the detective's immediate area of control or immediate presence.

CRIMINAL LAW — LARCENY FROM THE PERSON — ELEMENTS — PROXIMITY TO VICTIM.

Larceny from the person requires the prosecution to prove (1) the taking of someone else's property without consent, (2) movement of the property, (3) the intent to steal or permanently deprive the owner of the property, and (4) that the property was taken from the person or from the person's immediate area of control or immediate presence; larceny from the person is not accomplished if the victim and the perpetrator are merely in sight or hearing range of each other (MCL 750.357).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

Law Office of John D. Roach, Jr., PLC (by *John D. Roach, Jr.*), for defendant.

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, J.

GLEICHER, J. Defendant, Chandra Valencia Smith-Anthony, placed a $58 box of fragrance in a shopping bag and left the Macy's department store in Northland Mall without paying for it. After completing her larceny

and leaving the store, defendant engaged in a scuffle with a store security officer. A jury acquitted defendant of unarmed robbery but convicted her of larceny from the person in violation of MCL 750.357. Because the statute punishes "stealing from the person of another" and defendant's conduct does not fall within that definition, we reverse.

I. FACTUAL BACKGROUND

While monitoring a closed-circuit television in Macy's loss-prevention office, Khai Krumbhaar, a loss-prevention detective, observed defendant "darting her eyes around and holding her handbags very, very closely." Krumbhaar believed that defendant looked suspicious, and paid close attention to the television monitors as defendant traversed the aisles. In the women's fragrance department, Krumbhaar saw defendant select "a large gold White Diamonds box," priced at $58, from a display. Krumbhaar walked from her office vantage point to an area within "visual range" of defendant and "kept watching her" while pretending to be just another shopper. Under Krumbhaar's surveillance, defendant carried the White Diamonds box to the women's shoe department, sat down, and tried on some shoes. Defendant then rose from her seat and while making her way to the optical department, pushed the box into her shopping bag. After stopping to verify that defendant had not paid for the fragrance, Krumbhaar followed in pursuit. As defendant browsed near the fashion jewelry area, Krumbhaar "stayed back giving her some space." Krumbhaar then caught sight of defendant "walking very quickly" out of the store. Krumbhaar confronted defendant approximately 30 or 35 feet into the mall surrounding the store, and the two

scuffled. Krumbhaar claimed that during the struggle, defendant bit and scratched Krumbhaar's arm.

The prosecution charged defendant with unarmed robbery, MCL 750.530, second-degree retail fraud, second or subsequent offense, MCL 750.356d(4), and possession of marijuana, MCL 333.7403(2)(d). On the day of trial, the prosecution dismissed the marijuana and retail-fraud charges.[1] The jury acquitted defendant of unarmed robbery, but convicted her of the lesser offense of larceny from the person, MCL 750.357. The court subsequently sentenced defendant to 4 to 20 years' imprisonment.

II. ANALYSIS

Defendant argues that the prosecution presented no evidence that she stole any item from the person of another and therefore failed to sufficiently support the convicted offense. When reviewing a defendant's challenge to the sufficiency of the evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). We review de novo underlying issues of statutory interpretation. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). We must apply the plain, unambiguous language of a statute as written and may only engage interpretative tools when the statutory language is equally susceptible to more than one meaning. *People v Valentin*, 457 Mich 1, 5-6; 577 NW2d 73 (1998).

[1] The prosecution likely dismissed the second-degree retail-fraud charge because the statute proscribes the theft of items priced between $200 and $1,000. See MCL 750.356d(1)(b).

The statute at issue in this case could not be simpler. It provides: "Any person who shall commit the offense of larceny by stealing *from the person of another* shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years." MCL 750.357 (emphasis added). To establish a larceny-from-the-person charge beyond a reasonable doubt, the prosecution must prove "(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken *from the person or from the person's immediate area of control or immediate presence.*" *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005) (emphasis added).

In *People v Adams*, 128 Mich App 25, 31-32; 339 NW2d 687 (1983), this Court explained that separate and distinct policies animate the statutes punishing simple larceny and larceny from the person:

> [T]he Legislature decided that larceny from a person presents a social problem separate and apart from simple larceny. This separate social problem must be *the invasion of the person or immediate presence of the victim*, because that is what distinguishes larceny from a person and simple larceny. Because the Legislature clearly intended the statute defining the crime of larceny from a person *to protect the person or immediate presence of the victim from invasion*, the Legislature clearly intended to permit a separate conviction for each victim whose person or immediate presence is invaded. [Emphasis added; citation omitted.]

In *United States v Payne*, 163 F3d 371, 375 (CA 6, 1998), the United States Court of Appeals for the Sixth Circuit construed larceny from the person in violation of MCL 750.357 as "a crime that creates a substantial risk of physical harm to another." The Sixth Circuit reasoned:

> Michigan law interprets "from the person" narrowly to require that the property be taken from the possession of the victim or be taken from within the immediate presence or area of control of the victim. This is clearly the type of situation that could result in violence. Any person falling victim to a crime involving such an invasion of personal space would likely resist or defend in a manner that could lead to immediate violence. [*Id.*]

Thus, theft from the person constitutes an aggravated offense because of its hybrid nature as a crime against both a person and a person's property rights.

The larceny-from-the-person statute punishes pickpockets, purse- and wallet-snatchers, and others who invade the person or "immediate presence" of the victim to accomplish a theft. See *People v Gould*, 384 Mich 71, 80; 179 NW2d 617 (1970); *Perkins*, 262 Mich App at 272. Indirect contact with the victim may also constitute larceny from the person. For example, a thief who snatches a suitcase that the victim has momentarily set down while hailing a cab commits larceny from the person, as does a customer who snatches a diamond ring from a tray presented by a jeweler for inspection. In both instances, the theft instills fear or places a resistant victim in danger. The statute enhances punishment in these situations precisely because violating a person's privacy or personal space results in a risk of violent confrontation. *Perkins*, 262 Mich App at 272.

The prosecution presented no evidence that defendant committed larceny from Krumbhaar's person when she stole the fragrance box from Macy's. No testimony supported that Krumbhaar ever possessed the fragrance box or that the merchandise was in Krumbhaar's area of immediate presence or control at any point during the larceny. When defendant first removed the White Diamonds box from the display,

Krumbhaar sat in an office around the corner from the women's fragrance department, watching the event on closed-circuit television. As defendant made her way through Macy's with the box in hand, Krumbhaar remained "in visual range." But Krumbhaar never testified that she was even within an arm's length of defendant or that defendant knew Krumbhaar was nearby. Nor does the record substantiate that Krumbhaar was within defendant's "immediate presence" when defendant pushed the perfume box into her brown grocery bag, completing the act of larceny. See *People v Randolph*, 466 Mich 532, 549; 648 NW2d 164 (2002) ("[W]hen defendant placed the merchandise under his clothing, he committed a taking without force, and his conduct constituted a completed larceny.").[2] Although Krumbhaar could see defendant commit the larceny, the prosecution failed to establish that defendant was ever close enough to Krumbhaar to invade Krumbhaar's personal space.[3]

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[2] Krumbhaar testified that she "was able to stay fairly close" to defendant in the fragrance department. In our view, that testimony does not describe being within defendant's "immediate presence." Defendant completed her larceny in the shoe department. Krumbhaar's location at that point is not mentioned in the record. No testimony supports that before defendant left the store, Krumbhaar was ever close enough to defendant to have touched her or to have snatched the box from defendant's hands.

[3] We note that the plain and unambiguous statutory language punishes larceny committed "from the person." Other courts construing identical statutory language have rejected the "immediate presence" gloss added in *Gould*. See *Terral v State*, 84 Nev 412, 414; 442 P2d 465 (1968) ("The crime is not committed if the property is taken from the immediate presence, or constructive control or possession of the owner. Other crimes may be committed in those circumstances, but not the crime of larceny from the person. The statutory words 'from the person' mean precisely that.") (citations omitted); *State v Crowe*, 174 Conn 129, 134; 384 A2d 340 (1977) ("In our view, larceny from the person requires an actual trespass to the person of the victim.").

We respectfully disagree with the dissent's proposition that larceny from the person may be accomplished if the victim and the perpetrator are merely in sight or hearing range of each other. *Post* at 428-429. Proof of "stealing from the person of another" requires more than vague proximity between victim and perpetrator. See *People v Gadson*, 348 Mich 307, 308-310; 83 NW2d 227 (1957) (overturning a larceny-from-the-person conviction when the prosecution failed to establish beyond a reasonable doubt that the defendant took the money from the victim's person rather than simply "surreptitious[ly] taking" the money after it fell from the victim's pocket). As interpreted by our Supreme Court in *Gould*, the statute protects property on a victim's person or within a victim's "immediate" custody and control, and the prosecution must present proof beyond a reasonable doubt of that proximity element. *Gould*, 384 Mich at 80.

Further, we find no support in any jurisdiction's caselaw for the dissent's broad definition of "immediate presence." To the extent that the dissent relies on *Gould*, we believe that reliance is misplaced. The defendant and the codefendants in *Gould* entered a restaurant, announced a holdup, and forced a waitress and a customer to lie on the floor of another room. *Gould*, 384 Mich at 73-74. The robbers took $77 from a cash register and a cigar box and $7 from the customer's wallet. *Id.* at 74. A jury convicted the defendant of larceny from the person. *Id.* at 73. This Court had reversed the defendant's conviction because " 'the criminal information on which defendant was tried alleges only the taking of the money from the cash register and cigar box in the presence of the waitress.' " *Id.* at 74-75, quoting *People v Gould*, 15 Mich App 83, 86-87; 166 NW2d 530 (1968). A majority of this Court determined that because the information omitted ref-

erence to the theft from the customer's wallet, " 'larceny from the person was not an included offense.' " *Gould*, 384 Mich at 75, quoting *Gould*, 15 Mich App at 92. No objection to the information had been raised in the trial court. *Gould*, 384 Mich at 76.

The Supreme Court reversed, citing four different reasons. First, the Supreme Court determined that the information adequately alleged the theft from the customer's wallet. *Id.* at 76-77. Second, the Court held that the defendant qualified as an "accessory" to the theft from the wallet. *Id.* at 78. Third, the Court noted that MCL 767.76 provides that a conviction may not be reversed "on account of any defect in form or substance of the indictment" unless an objection was made "prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit." *Id.* Finally, the Supreme Court held "that the taking of property in the possession and immediate presence of the waitress and customer in this case was sufficient to sustain a verdict against defendant Gould of larceny from the person." *Id.* at 80. In contrast with *Gould*, no testimony in this case supports a finding that Krumbhaar ever got close enough to the White Diamonds box to immediately possess it or that defendant stole the item while invading Krumbhaar's person or encroaching on her "immediate presence."[4]

We do not imply that defendant's conduct of resisting detention or stealing the store's merchandise was lawful; defendant's conduct simply did not implicate the larceny-from-the-person statute. The prosecution could

[4] We further find the dissent's reliance on *People v Beebe*, 70 Mich App 154; 245 NW2d 547 (1976), misplaced. In *Beebe*, this Court construed the armed robbery statute, which at the time applied to armed thefts from a victim's person "or in his presence." Unlike the statutory prohibition of larceny from the person, the armed robbery statute protects an area outside the victim's personal space.

have easily established that defendant committed third-degree retail fraud. See MCL 750.356d(4)(b) (proscribing the theft of merchandise priced less than $200). Defendant's violent actions during her attempted escape also potentially fell within the ambit of the transactional-unarmed-robbery statute. That statute specifically proscribes the use of "force or violence against any person who is present" or assaulting or putting a victim in fear while "in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530. However, the jury acquitted defendant of unarmed robbery, and we may not second-guess its judgment. See *United States v Scott*, 437 US 82, 91; 98 S Ct 2187; 57 L Ed 2d 65 (1978) (noting that reconsideration of a jury's judgment of acquittal violates a criminal defendant's constitutional protection against double jeopardy). We must take the charges as we find them, and defendant's actions did not support a charge, let alone a conviction, under the plain language of the larceny-from-the-person statute.

Reversed.

SHAPIRO, P.J., concurred with GLEICHER, J.

WHITBECK, J. (*dissenting*). The majority here decides that defendant, Chandra Valencia Smith-Anthony, did not commit larceny from the person of another[1] because her conduct did not fall within the definition of that crime. I disagree, and I respectfully dissent.

This is a case with only one witness, a Macy's loss-prevention detective named Khai Krumbhaar. Krumbhaar's uncontradicted testimony established that Smith-Anthony selected a box of White Diamonds perfume from

[1] MCL 750.357.

a display in the women's fragrance department at Macy's, then walked through other areas of the store, ultimately pushed the White Diamonds box into a bag, and left the store without paying for the perfume.

As the majority sets out, the statute provides, "Any person who shall commit the offense of larceny by stealing *from the person of another* shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years."[2] Larceny from the person is a lesser included offense of robbery,[3] and it is "the lack of force or violence [that] distinguishes larceny from a person from the offense of robbery."[4] The operative phrase in the statute is "from the person of another," and the courts have interpreted this phrase as meaning that the property that is the subject of the larceny must be "taken from the person *or from the person's immediate area of control or immediate presence.*"[5]

The person in question here is Krumbhaar, as caselaw holds that a defendant may be found guilty of robbery, or the lesser included offense of larceny from the person, if the defendant takes property owned by a business (such as Macy's) in the immediate presence of an employee (such as Krumbhaar) who oversees or protects the property.[6] As a loss-prevention detective, Krumbhaar clearly oversees and protects Macy's property.

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[2] *Id.* (emphasis added).

[3] *People v Beach*, 429 Mich 450, 484; 418 NW2d 861 (1988).

[4] *People v Perkins*, 262 Mich App 267, 272; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005).

[5] *Id.* at 271-272 (stating that the elements of larceny from the person are "(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence").

[6] *People v Gould*, 384 Mich 71, 80; 179 NW2d 617 (1970); See *People v Rodgers*, 248 Mich App 702, 712-713; 645 NW2d 294 (2001) (noting that

But there is no assertion, and no evidence, that Smith-Anthony took the White Diamonds box from Krumbhaar's actual person. The only question, then, is whether there was sufficient evidence for a jury to conclude that when Smith-Anthony took the White Diamonds box and stuffed it into her bag, she was in Krumbhaar's "immediate area of control or immediate presence." (I agree with the majority's view that Smith-Anthony completed the act of larceny when she placed the White Diamonds perfume in her shopping bag.) Viewing Krumbhaar's testimony, as we must, in a light most favorable to the prosecution,[7] I believe there was sufficient evidence to support the guilty verdict that the jury returned on the charge of larceny from the person, a guilty verdict for which the trial court sentenced Smith-Anthony as a third-offense habitual offender[8] to 4 to 20 years in prison. I would affirm the jury's verdict and the trial court's sentence.

I. FACTS

I accept the majority's statement of facts with one major exception, which relates to Krumbhaar's testimony about what happened after she observed Smith-Anthony's "nervous" behavior on the monitor in the loss-prevention office. At the risk of being tedious, I set out Krumbhaar's testimony verbatim:

> *Q*. Okay, and so based on her behaviors what, if anything, did you do?

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for purposes of an armed robbery analysis, the court must consider whether an employee had a greater right to the property than the defendant).

[7] *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

[8] MCL 769.11.

A. Based on her behaviors I turned the monitor to follow her as she watched—walked through the men's department and approached the men's fragrance counter.

Q. Okay, and then what did you see?

A. At the men's fragrance counter I observed her apparently in conversation with one of the associates.

Q. Okay.

A. She placed her bag on the counter, stood there with the associate for several minutes and then took her bag and walked from the men's fragrance department into the women's fragrance department.

Q. Okay. Now, are you still in the office where the closed circuit television is at this point?

A. At this point I was.

Q. And at that time in the morning were there any other loss prevention officers on duty at that time?

A. There were not. The next detectives didn't come in until 11:00.

Q. Okay. So what happened next after you saw this person or this female go into the female or the women's fragrance section?

A. I noticed the lady walk from the men's fragrance department around into the women's fragrance department. In that department she walked around the outside of the area and then walked to a White Diamonds fragrance display and she selected a large gold White Diamonds box.

Q. Okay, White Diamonds is a cologne—

A. It's a—

Q. —or perfume?

A. It's a fragrance.

Q. Okay, and you said that she selected a large gold gift box?

A. Yes, Ma'am.

Q. Okay, so it wasn't just a single box containing one bottle, it was a larger box?

A. It was a larger box that has one fragrance bottle and then three various creams that are all scented with White Diamonds.

Q. Okay. What, if anything, did you do at that point?

A. At that point, based on her behavior and based on the fact that I was the only detective on at the time, I went to the floor to gain floor observation. My office is right around the corner from where the women's fragrance department is.

It took me fifteen, twenty seconds to get in visual range of her again and she still had the box in her hand.

Q. Okay. Now, now at this point the box is visible and in her hand?

A. Yes.

Q. Okay. When you say that you went to floor to gain sight of her—

A. Yes.

Q. —what did you do once you made it to the floor?

A. Because we're plain clothes detectives I pretended to—that I was shopping in the area and kept visual—I kept watching her.

Q. Is that part of your role as a loss prevention officer? This is something that you do—

A. Yes.

Q. —routinely?

A. We wear plain clothes.

Q. I'm sorry, what?

A. We wear plaint [sic] clothes, we just wear normal clothes like we're shopping.

Q. Okay.

A. *So I was able to stay fairly close to her in the fragrance department without attract—without her noticing me.*

Q. And what, if anything, did you observe?

A. I observed—I observed two different associates approach her and offer assistance *and she both times said that she did not need assistance.* She walked from the women's fragrance department into the women's shoes department and sat down. There, I saw one of the sales people approach her *and she asked for a pair of shoes*—

Q. Okay.

A. —and she tried on some shoes in the women's shoes department. At that point she had her tote bag and the plastic shopping bag and the White Diamonds gift box next to her on a chair.

Q. Okay, and what, if anything, did you notice at that point?

A. At that point she still was—she still looked very, very nervous. She was moving a little bit jerkily and she was still kind of pulling the gift box close to her and she was kind of edging it towards her bags.

Q. What happened next?

A. She got up from her chair in the shoe department and she picked up all of her bags and the gift box and she was holding the gift box down near the opening of the brown shopping bag.

Q. Okay.

A. And she walked—she rose, she got up from her chair and she walked through women's shoes into the—(undecipherable)—op—optical and at that point she pushed the bag down—or the box down into her shopping bag.

Q. Okay. Now when you're talking about the shopping bag are you referring to the tote bag that you described or are you referring to the brown transparent—is that the word you used, transparent?

A. Yes.

Q. The brown grocery bag?

A. The grocery bag.

Q. The brown grocery bag, okay. And what happened next?

A. At that point it was in the grocery bag but the box was larger than the bag *so I could still see about half the box sticking out*. At that point she walked around the corner from optical into fashion jewelry and I—I followed her through women's shoes and *I stopped to check that she had not purchased the shoe—or the box there. I had not observed her passing money or credit cards*.

Q. Okay.

A. So I knew that she hadn't paid for the box.

Q. Okay. And then what happened?

A. I followed her around fashion jewelry and she stopped and stood there for a minute, so I stayed back giving her some space. There were several open registers nearby so I wanted to see if she was going to pay for it, but she did not, she went out walking very quickly, she walked out our fashion jewelry door and out—

Q. Okay, now when you—

A. —into the mall.

Q. I'm sorry?

A. She walked out into the mall.[9]

There are several things that stand out from this testimony. First, Krumbhaar personally, and not through the monitor in Macy's loss-prevention office, saw Smith-Anthony in the women's fragrance department with the White Diamonds box in her hand. In other words, Smith-Anthony was within Krumbhaar's line of sight.

Second, Krumbhaar got "fairly close" to Smith-Anthony while she was in the women's fragrance department. In fact, Krumbhaar was close enough to hear

[9] Emphasis added.

two different salespersons approach Smith-Anthony and offer assistance and to hear Smith-Anthony decline assistance both times.

Third, Krumbhaar followed Smith-Anthony as she walked into the women's shoe department and remained close enough to Smith-Anthony that she could hear Smith-Anthony when she asked for a pair of shoes.

Fourth, Krumbhaar saw Smith-Anthony place the White Diamonds box into a bag she was carrying, the point at which the majority concludes that Smith-Anthony completed her act of larceny. In fact, Krumbhaar was close enough to Smith-Anthony to observe that about half of the White Diamonds box was sticking out of the bag.

Fifth, Krumbhaar continued to follow Smith-Anthony through the store and out into the mall, and remained close enough that she was able to observe that Smith-Anthony did not pass money or credit cards to pay for the perfume she carried in her bag.

These facts are undisputed. Indeed, I note that defense counsel devoted no time in cross-examination to the question of Krumbhaar's physical location at the time Smith-Anthony placed the White Diamonds box in her bag. With these facts in mind, the issue remains the same: Was there sufficient evidence for a jury to conclude beyond a reasonable doubt that Smith-Anthony was within Krumbhaar's "immediate area of control or immediate presence" when Smith-Anthony completed the larceny at Macy's by placing the White Diamonds box in her bag?

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

As I noted, when reviewing the sufficiency of the evidence, this Court reviews the evidence de novo in the

light most favorable to the prosecution.[10] This Court determines whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.[11]

B. LEGAL STANDARDS

Again, as I noted, to establish that "the property was taken from the person or from the person's immediate area of control or immediate presence,"[12] the prosecution does not have to show that the victim owned the property taken.[13] Rather, the prosecution need only present sufficient evidence to show that the victim's right to possess the property was superior to the defendant's right to possess it.[14] A defendant may be found guilty of robbery, or the lesser included offense of larceny from the person, if the defendant takes property owned by a business in the immediate presence of an employee who oversees or protects the property.[15] Thus, the jury here could find Smith-Anthony guilty of larceny from the person if it could reasonably find that she took the White Diamonds box, owned by Macy's, in the immediate presence of an employee, Krumbhaar, who oversaw and protected that property.

C. ANALYSIS

1. CLEARING THE UNDERBRUSH

There is undisputed evidence that at the time of the crime in question, Macy's owned the perfume gift set

[10] *Tombs*, 472 Mich at 459; *Ericksen*, 288 Mich App at 196.

[11] *Ericksen*, 288 Mich App at 196.

[12] *Perkins*, 262 Mich App at 272.

[13] *Rodgers*, 248 Mich App at 711.

[14] *Id.*

[15] *Gould*, 384 Mich at 80; *Rodgers*, 248 Mich App at 712-713.

and that Krumbhaar was a Macy's loss-prevention detective. As a Macy's loss-prevention detective, Krumbhaar was an employee responsible for protecting Macy's property.[16] Therefore, Krumbhaar's right to possess the property was superior to Smith-Anthony's right to possess the property before paying for it.[17]

The majority blurs the basic issue by asserting that no testimony "supported that Krumbhaar ever possessed the fragrance box . . . ." But the prosecution never asserted that Krumbhaar physically possessed the White Diamonds box. Caselaw makes it absolutely clear, it is Krumbhaar's *right* to possess the property—as an employee responsible for protecting Macy's property—that is the basic underpinning of the case. And it is also absolutely clear that Krumbhaar's *right* to possess the White Diamonds box was superior to that of Smith-Anthony.

2. IMMEDIATE AREA OF CONTROL OR IMMEDIATE PRESENCE

The majority asserts that "[a]lthough Krumbhaar could see defendant commit the larceny, the prosecutor failed to establish that defendant ever came close enough to Krumbhaar to invade Krumbhaar's personal space." Without speculating about the meaning of the words "personal space" in this context, I find nothing in Krumbhaar's testimony that supports this assertion. I note that in performing our review function, this Court is not to make decisions regarding a witness's credibility. The jury found Krumbhaar to be credible regarding what occurred within the Macy's store, and we are not to invade the province of that jury.[18] Further, we are not to determine, when reviewing a criminal conviction on sufficiency of the

[16] See *Gould*, 384 Mich at 80; *Rodgers*, 248 Mich App at 712-713.

[17] See *Rodgers*, 248 Mich App at 712.

[18] *People v Petrosky*, 286 Mich 397, 400; 282 NW 191 (1938).

evidence grounds, whether we would have reached the same result as the jury had we been sitting as jurors.[19] Rather, our review is limited to the question of whether there was sufficient evidence from which a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.[20]

Krumbhaar's testimony established that she was "fairly close" to Smith-Anthony. In fact, she was close enough not only to *see* Smith-Anthony but also to *hear* her twice decline assistance from salespersons in the women's fragrance department and to *hear* Smith-Anthony when she asked for a pair of shoes in the women's shoe department. Viewing this testimony in a light most favorable to the prosecution, I conclude that there was sufficient evidence from which a jury could find that the prosecution had proved beyond a reasonable doubt that Smith-Anthony was in Krumbhaar's "immediate area of control or immediate presence".

In my view, when a loss-prevention detective, whose job it is to protect his or her employer's property, is close enough to a defendant to *see* that defendant commit the crime of larceny from the person and to actually *hear* that defendant speak to other employees in the store, the defendant is as a matter of law within the loss-prevention detective's immediate area of control or immediate presence.[21] Thus, given that both of these criteria are satisfied here, there was sufficient evidence to support the jury's verdict.

I would affirm.

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[19] See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) (noting that a judge does not sit as a thirteenth juror regarding witness credibility).

[20] *Ericksen*, 288 Mich App at 196.

[21] See *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976).

PEOPLE v BRAGG

Docket No. 305140. Submitted February 9, 2012, at Detroit. Decided May 8, 2012, at 9:00 a.m.

Samuel D. Bragg was charged in the 34th District Court with first-degree criminal sexual conduct. At the preliminary examination, evidence was presented that in 2007 he had sexually assaulted his then nine-year-old cousin. The court, Brian A. Oakley, J., bound defendant over to the Wayne Circuit Court on the charged offense, in part because of the testimony of John Vaprezsan, defendant's pastor who had testified that defendant, while still a minor, confessed the crime during a meeting with Vaprezsan, defendant, and defendant's mother. The circuit court, Cynthia Gray Hathaway, J., affirmed the bindover decision on the basis of the victim's testimony, but determined that the district court had abused its discretion by admitting the pastor's testimony in violation of the cleric-congregant privilege. The circuit court ruled that the privilege applied to exclude Vaprezsan's testimony, and the prosecution appealed.

The Court of Appeals *held*:

1. Under MCL 600.2156, a minister of the gospel, priest of any denomination, or an accredited Christian Science practitioner may not disclose confessions made to the minister, priest, or practitioner in his or her professional character, in the course of discipline enjoined by the rules or practice of the denominations. The evidentiary privilege of MCL 767.5a(2) provides that any communications between members of the clergy and members of their respective churches are privileged and confidential when those communications were necessary to enable members of the clergy to serve as such member of the clergy.

2. Both MCL 600.2156 and MCL 767.5a(2) address a witness's duty to testify upon a court's summons and those situations in which that testimony is excused or not allowed. The Legislature's use of the broad term "disclose" indicates that MCL 600.2156 precludes a cleric from revealing certain covered statements to anyone, not just before a court of law. MCL 767.5a(2) is more specific, however, and uses specific legal terms to declare that any covered communications are privileged and confidential. Reading

the statutes together, MCL 600.2156 applies only to confessions, broadly precludes a cleric from disclosing confessions in many situations, not just the courtroom, and is not an evidentiary privilege. The more specific MCL 767.5a(2), however, creates an evidentiary privilege that precludes the incriminatory use of any communication made by a congregant to his or her cleric when that communication was necessary to enable the cleric to serve as such.

3. A communication is privileged under MCL 767.5a(2) when it was necessary to enable the cleric to serve as a member of the clergy. When the communication to the cleric was made in the cleric's professional character or was made in the course of discipline enjoined by the rules or practice of the denomination, it was likely necessary to enable the cleric to serve as a cleric.

4. A communication is necessary to enable a cleric to serve as a cleric if it serves a religious function such as providing guidance, counseling, forgiveness, or discipline. A communication is made to a cleric in the cleric's professional character when it is directed to a clergyman in his or her capacity as a spiritual leader within the religious denomination, and the communication may not arise from the congregant speaking to the cleric in his or her role as a relative, friend, or employer. Guidance by a clerical witness about whether a communication would be considered confidential under the discipline or practices of a specific religion must be accepted because a court's consideration of a particular religion's stance on confidential communications and the role or duty of its clerics would offend First Amendment principles.

5. Defendant's statements to Vaprezsan were privileged and confidential communications under MCL 767.5a(2). The communication served a religious function because it enabled the pastor to provide guidance, counseling, forgiveness, and discipline to defendant. When Vaprezsan spoke with defendant in a nonsecular manner and prayed with him during the communication, he acted in his professional character as a pastor. Defendant's communication with Vaprezsan was made in the course of discipline enjoined by the Baptist Church, the denomination for which he was a pastor. Because defendant's communication with Vaprezsan was privileged and confidential, the circuit court properly precluded any further use of the evidence.

6. The evidentiary privilege of MCL 767.5a(2) applies regardless of whether the communication is initiated by the cleric or the congregant. The cleric-congregant privilege belongs to the penitent, and only he or she may waive the privilege, by, for example, giving evidence of what took place at the confessional or by sharing

the content of the otherwise privileged communication with a third party. Defendant timely asserted the cleric-congregant privilege in the district court and did nothing to expressly or implicitly waive the privilege. The presence of defendant's mother during defendant's meeting with Vaprezsan did not constitute a waiver of the cleric-congregant privilege because defendant was a minor at that time.

Affirmed.

1. EVIDENCE — PRIVILEGES — CLERIC-CONGREGANT PRIVILEGE — ADMISSION OF COMMUNICATIONS.

Under MCL 600.2156, a minister of the gospel, a priest of any denomination, or an accredited Christian Science practitioner may not disclose confessions made to the minister, priest, or any practitioner in his or her professional character, in the course of discipline enjoined by the rules or practice of the denomination; the evidentiary privilege of MCL 767.5a(2) provides that any communications between members of the clergy and members of their respective churches are privileged and confidential when those communications were necessary to enable members of the clergy to serve as a member of the clergy; MCL 600.2156 applies only to confessions, broadly precludes a cleric from disclosing confessions in many situations, not just the courtroom, and is not an evidentiary privilege; MCL 767.5a(2), however, is more specific and creates an evidentiary privilege that precludes the incriminatory use of any communication made by a congregant to his or her cleric when that communication was necessary to enable the cleric to serve as a cleric.

2. EVIDENCE — PRIVILEGES — CLERIC-CONGREGANT PRIVILEGE — COMMUNICATIONS COVERED.

A communication is privileged under MCL 767.5a(2) when it was necessary to enable the cleric to serve as a member of the clergy; if the communication to a cleric was made in his professional character or made in the course of discipline enjoined by the rules or practice of the denomination, it was likely necessary to enable the cleric to serve as a cleric; a communication would be necessary to enable the cleric to serve as a cleric when it serves a religious function such as providing guidance, counseling, forgiveness, or discipline; a communication is made to a cleric in the cleric's professional character when it is directed to a clergyman in his or her capacity as a spiritual leader within the religious denomination; the communication may not arise from the congregant speaking to the cleric in his or her role as a relative, friend, or employer; guidance by a clerical witness about whether a commu-

nication would be considered confidential under the discipline or practices of a specific religion must be accepted because consideration by a court of a particular religion's stance on confidential communications and the role or duty of its clerics would offend First Amendment principles.

3. EVIDENCE — PRIVILEGES — CLERIC-CONGREGANT PRIVILEGE — WAIVER.

The evidentiary privilege of MCL 767.5a(2) applies regardless of whether the communication is initiated by the cleric or the congregant; the privilege belongs to the penitent, and only he or she may waive the privilege, by, for example, giving evidence of what took place at the confessional or by sharing the content of the otherwise privileged communication with a third party; the presence of a minor defendant's parent during the communication does not waive the privilege.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

Law Offices of Raymond A. Cassar, PLC (by *Raymond A. Cassar*), for defendant.

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

GLEICHER, P.J. Defendant, Samuel Dale Bragg, was bound over for trial on a first-degree criminal sexual conduct charge, based in part on the testimony of Pastor John Vaprezsan, who shared with the district court defendant's admission to having sexually assaulted defendant's then nine-year-old cousin. The circuit court quashed defendant's statement to the pastor under the cleric-congregant privilege,[1] leading to the prosecution's interlocutory application for leave to appeal. Because defendant's communication to Vaprezsan

[1] This privilege is known by many names, including the "priest-penitent privilege" or the "cleric-communicant privilege."

was privileged and confidential under MCL 767.5a(2), we affirm the circuit court's exclusion of that evidence from defendant's trial.[2]

It is important to note at the outset the limited nature of the issue before us for review. We are not faced with a pastor who learned of ongoing or future criminal activity and struggled over whether to report it to the authorities. We are not asked to consider whether a cleric may speak to the police concerning information conveyed with an expectation of privacy. Today, we consider only whether a cleric may reveal in court a congregant's statements made in confidence.

I. FACTUAL AND PROCEDURAL HISTORY

In the summer of 2007, the then nine-year-old victim spent a three-day weekend at the home of her aunt, K.,[3] who lived there with her two children, then 15-year-old defendant and 10-year-old H. According to the victim, K. required her to spend the first night of her visit in the same bed as defendant. The victim awoke in the middle of the night when defendant pulled down her pants and underwear. He then penetrated her rectum with his penis. When the victim tried to yell, defendant allegedly pushed her face into a pillow and threatened to kill her if she told anyone. The second night of her visit, K. allowed the victim to share a bed with H. The victim alleged that defendant came into the room in the middle of the night while H. was sleeping. Defendant allegedly put his hand inside the victim's pants and fondled her buttocks and vaginal area. The victim told defendant to stop and moved closer to H., who did not

[2] Defendant does not challenge the sufficiency of the remaining evidence, and trial may proceed absent the pastor's testimony.

[3] In an attempt to protect the identity of the minor victim, we will refer to certain witnesses by initial only.

awaken. In the morning, the victim informed K. that defendant had come into H.'s room. She asked if she could sleep in K.'s room that night. K. agreed and confronted defendant, who denied having gone into H.'s room the night before. The victim testified that defendant later reminded her of his earlier threat.

The victim told no one of these events until 2009, when she was 11 years old. After hearing a church sermon on purity, the victim revealed the 2007 assaults to her mother. The victim's mother shared the information with her husband, and the family reported the events to the Belleville Police Department. The victim's family then approached Vaprezsan, the pastor of the Baptist church they attended, for counseling and advice.

Defendant and his mother, K., were parishioners at the same church. Vaprezsan had known defendant since he was five years old, and K. was employed as the church secretary. After hearing the victim's story, Vaprezsan telephoned K. and asked her to bring defendant to the church as soon as possible for a meeting. K. and defendant arrived at the church at 11 p.m., after defendant's work shift ended. Vaprezsan met with defendant and K. in his office, where he allegedly elicited defendant's confession. Vaprezsan shared the content of defendant's statements with the victim's family, who then provided the statements to the police. A Belleville police detective later contacted Vaprezsan, who furnished a written statement detailing his conversation with defendant.

The prosecution ultimately charged defendant with first-degree criminal sexual conduct in violation of MCL 750.520b. At a preliminary examination conducted before 34th District Court Judge Brian A. Oakley, the prosecution sought to introduce the pastor's testimony

regarding his conversation with defendant. Defendant objected, raising the statutory cleric-congregant privilege. Defendant contended that Vaprezsan heard defendant's statements while acting in his role as a pastor. He argued that K.'s presence did not vitiate the evidentiary privilege because defendant was a minor. The prosecutor responded that defendant's age at the time of the communication lacked relevance and the presence of a third party rendered the privilege inapplicable.

The district court adjourned the examination and requested that the parties supplement their arguments. When the hearing continued two weeks later, defendant reiterated his argument that K.'s presence in Vaprezsan's office did not eliminate the privilege. Defendant noted that Vaprezsan had summoned both K. and defendant to his office, leaving defendant no opportunity to challenge her participation. Defendant further noted that K.'s attendance was essential because he was a minor at the time of the meeting. Defendant cited *Bassil v Ford Motor Co*, 278 Mich 173, 178; 270 NW 258 (1936), overruled in part on other grounds by *Serafin v Serafin*, 401 Mich 629, 634 n 2; 258 NW2d 461 (1977), for the proposition that "the presence of one sustaining an intimate family relation" during an otherwise confidential meeting does not waive the evidentiary privilege. Defendant also raised a public policy argument premised on the danger of court invasion into religious relationships.

The prosecutor responded by referring to MCL 600.2156, which prohibits ministers from disclosing confessions. Although the prosecutor conceded that Vaprezsan was a religious minister to whom the privilege would apply under the correct circumstances, she contended that defendant's statements were not "confessions" protected by the statute because they were

made in front of a third party. The prosecutor argued that by allowing K. to attend the meeting, defendant essentially waived the privilege, negating that defendant's statements to Vaprezsan had been made in the course of discipline enjoined by the church as contemplated by MCL 600.2156. The prosecutor insisted that Vaprezsan had summoned defendant; defendant did not "seek out [Vaprezsan] to unburden his soul, to seek penance."

The district court admitted the evidence, stating:

> I don't think who . . . initiates the conversation is the end all and be all. But, I think it's an indication that this was not a communication between the defendant and his pastor, uh, where there was any discipline involved, which is required under [MCL] 600.2156. Or, that it was the type of communication that is necessary for the pastor to be a pastor, which is the definition of [MCL] 757.5a(2) [sic]. Um, the pastor's statement is; that after repeated questioning, the defendant quote, end quote, broke down. That doesn't sound like the defendant was there for, uh, any kind of forgiveness, any kind of, uh, religious counseling, or anything else.
>
> Um, quite simply, I don't think this case meets the definition of a confession in the . . . generally accepted religious, uh, definition of the word. And, as such, I'm going to allow the pastor . . . to testify today.

The pastor then took the stand and testified that he called defendant and K. into his office without forewarning them of the topic for discussion. Vaprezsan admitted that defendant and K. likely believed that they were being summoned for counseling on some issue. In response to defense counsel's inquiry, the pastor explained that he requested K.'s presence during the meeting even though it was not required because defendant was a minor and it was "the right thing to do."

Once inside his office, Vaprezsan shared the information he had learned from the victim "to find out . . . from [defendant] . . . if this did occur" and, if so, "to deal with . . . the aftermath." During the conversation, Vaprezsan was "upset" and "very controlling" because he "was angry at the sin and what sin causes." Vaprezsan denied "screaming" at defendant, claiming that he approached the situation as "a loving broken hearted pastor." The first step "to get[ting] some help" was to uncover the truth. Vaprezsan testified that defendant initially denied the allegations. Vaprezsan "reasoned with" defendant, asking him why his cousin would fabricate such a story. Defendant allegedly broke down, began to weep and admitted the accuracy of the details provided by the victim. Vaprezsan consoled defendant "with [his] spirit, with [his] attitude, with [his] love for [defendant]." During this interview, K. remained in the room, "[q]uiet and weeping." When the interview was over, Vaprezsan prayed with defendant and K., and "asked God to - - to help us through this and help [defendant]."

Defense counsel questioned the pastor about the Baptist Church's position on "keeping confidences." Vaprezsan, who had been a pastor for 38 years, replied that he was taught that "[t]here's no need in others knowing personal matters, that are discussed with me." Vaprezsan stated that confidentiality is a key to promoting communications between clergy and congregants and that he had preached his duty of confidentiality from the pulpit. The prosecutor inquired, "[U]nder the Baptist doctrine, under your church rules, would this communication that you had with him, and the nature how the communication came about, would that be . . . considered a confidential communication?" Vaprezsan responded, "I'm

sure it would." He immediately qualified his statement, indicating that disclosing the "confidential" communication with the victim's family and the police was not a violation of Baptist doctrine and was "the right thing to do." Vaprezsan indicated that part of dealing with the "aftermath" was to notify the victim's family of defendant's admission so that they could pursue legal recourse. The prosecutor also asked Vaprezsan if he had shared "what had happened . . . in this meeting with anyone else." The pastor replied: "No. I didn't, uh - - no. That's - - that's a private matter that I did not share, that I can recall, with anyone else. I don't even share things like that with my wife."

At the close of the pastor's testimony, defense counsel renewed the motion to exclude the evidence, arguing:

> He's clearly testified to you that he was in the role of the pastor. And, his role was to counsel [defendant], and counsel [K.], in the role acting as pastor. Not acting as he would put it, in the role of a police officer. He was there acting in the role of pastor; I wanted to console him, I wanted to find out what had happened. At the church, a meeting with a member of his congregation, that he's known since he was five, and his mother.
>
> Your Honor, this falls squarely within . . . [the] priest-penitent privilege.

The district court denied defendant's renewed motion. K. then took the stand and rebutted the pastor's version of events. She claimed that Vaprezsan called her and defendant into his office, where he accused defendant of touching the victim inappropriately. K. asserted that Vaprezsan stood close to defendant, yelling in his face and claiming to know his guilt. K. stressed that defendant never confessed to any crime.

The district court bound defendant over to the circuit court for trial. When arguing in favor of the bindover,

the prosecution relied on the victim's testimony "coupled with the . . . other evidence that" had been placed before the court, "particularly [the testimony] of the pastor:"

> A man of God, um, to suggest that he's lied to the police, lied to this Court while under oath, when he has absolutely nothing to gain by becoming involved in this. Um, in fact he said that he loves the defendant and forgives him, um, is just absolutely unfounded at this point. Um, clearly the mother's testimony is what it is. But, I would submit that she clearly has a - - a motive to, um, assist her son and a mo - - motive to lie. And clearly, both of them can't be correct.
>
> The pastor and the mom, one of them is completely lying about what happened during that, um, conversation. Um, but for those reasons, I believe there's sufficient evidence to bind over . . . .

At a pretrial conference, Wayne Circuit Court Judge Cynthia Gray Hathaway approved the bindover, concluding that the victim's testimony was sufficient to support the elements of the charged offense. However, the circuit court determined that the district court had abused its discretion by admitting the pastor's testimony in violation of the cleric-congregant privilege. The circuit court ruled that the privilege applied to exclude Vaprezsan's testimony regarding defendant's alleged statements to him as follows:

> I'm going to move on to the clergy-penitent privilege. And I'm not going to waste any time with it. I do believe that there was an abuse of discretion in that regard.
>
> And I think it occurred because the Magistrate failed to take an offer of proof before making his findings, and giving his decision that there was no privilege.
>
> When you read the Preliminary Examination testimony of the Pastor, in my mind, when you think about the purpose and goal of the First Amendment Separation of

> Church and State, I think that there was a clear privilege there, with the communication that was given to the Pastor.
>
> It doesn't make sense to me that the things that you both talked about, about the age of the defendant, the fact that his mother was present, or the fact that anybody else was present, the fact that the defendant did not go to the Pastor on his own initiative, none of those things I think are relevant.
>
> What's relevant is that the Pastor, I'm sure, called in - - in fact he testified that he wanted to counsel and discuss this sin. And that's all very religious in nature.
>
> That he also wanted to help both sides, both families. And that the whole purpose of having all of them there was to have a religious session.
>
> So, I think that a ruling that there was a violation of the clergy-penitent privilege is more consistent with the separation of Church and State goal than there was not.

Rather than proceeding to trial without the pastor's testimony, the court stayed the proceedings to allow the prosecution to seek this appeal. We subsequently granted the prosecution's delayed application for leave to appeal in this Court. *People v Bragg*, unpublished order of the Court of Appeals, entered September 8, 2011 (Docket No. 305140).

We reemphasize the narrowness of the question before us. We are not faced with a pastor who battled a dilemma about whether to report child sexual abuse; the victim's family had already contacted the authorities to accuse defendant of the assault. Moreover, the crime had occurred in the past, so we are not asked to consider whether a pastor may breach a confidence to prevent a future crime. We are not asked to determine whether the pastor was permitted to reveal defendant's statements to the police; indeed, that bell cannot be unrung. Rather, we consider only whether the pastor

may give testimony against his congregant, either voluntarily or by court order, disclosing statements made in confidence.

II. STANDARD OF REVIEW

We generally review a trial court's evidentiary rulings for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). A trial court abuses its discretion when its ruling falls outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). The underlying question regarding the statutory privilege is a mixed question of fact and law. *Centennial Healthcare Mgt Corp v Dep't of Consumer & Indus Servs*, 254 Mich App 275, 284; 657 NW2d 746 (2002). Specifically, we must review de novo the relevant statutes in an attempt to discern the Legislature's intent from the text's plain and unambiguous language. *People v Williams*, 294 Mich App 461, 474; 811 NW2d 88 (2011).

When interpreting and applying a statutory privilege, we must remember that "[t]estimonial exclusionary . . . privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence' " and therefore "must be strictly construed." *Trammel v United States*, 445 US 40, 50; 100 S Ct 906; 63 L Ed 2d 186 (1980), quoting *United States v Bryan*, 339 US 323, 331; 70 S Ct 724; 94 L Ed 884 (1950); see also *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000) ("Privileges are narrowly defined and their exceptions broadly construed."). As noted by our Supreme Court in *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994):

> Unlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster rela-

> tionships. . . . While the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth. . . . Privileges therefore are not easily found or endorsed by the courts. "The existence and scope of a statutory privilege ultimately turns on the language and meaning of the statute itself." *Howe v Detroit Free Press*, 440 Mich 203, 211; 487 NW2d 374 (1992). Even so, the goal of statutory construction is to ascertain and facilitate the intent of the Legislature.

As our Supreme Court similarly held in *Warren*, 462 Mich at 428, quoting 1 McCormick, Evidence (5th ed), § 72, pp 298-299:

> "The overwhelming majority of all rules of evidence have as their ultimate justification some tendency to promote the objectives set forward by the conventional witness' oath, the presentation of 'the truth, the whole truth, and nothing but the truth.' . . . By contrast the rules of privilege . . . are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light."

III. HISTORY OF THE CLERIC-CONGREGANT PRIVILEGE

Although sometimes classified as a common-law principle, the cleric-congregant privilege was not actually recognized in the common law of Anglican England or colonial America. *Cox v Miller*, 296 F3d 89, 102 (CA 2, 2002); *In re Grand Jury Investigation*, 918 F2d 374, 381 n 10 (CA 3, 1990); 8 Wigmore, Evidence (McNaughton rev), § 2394, p 870. The privilege arose from the papal law of the Roman Catholic Church, under which the "seal of the Confessional" was sacrosanct and any priest's violation of confidence was cause for excommunication. Mitchell, *Must clergy tell? Child abuse reporting requirements versus the clergy privilege and free exercise of religion*, 71 Minn L R 723, 735-736 (1987).

After the Protestant Reformation, however, the use of religious privileges in courts of law fell out of favor. Wigmore, § 2394, pp 869-870; Mitchell, pp 736-737.

The first American court to recognize a clergyman's privilege was the New York Court of General Sessions, which decided the case of *People v Phillips* in 1813.[4] In *Phillips*, a New York state court attempted to make a Catholic priest a witness based on information gleaned from the confessional. The priest responded that had he learned the information in his capacity "as a private individual," he would readily testify before the court. Sampson, *The Catholic Question in America* (1813), p 8. As he had learned the requested information during the sacrament of confession, the priest refused to reveal the source or the content lest he "become a traitor to [his] church" and "render [him]self guilty of eternal damnation." *Id.* at 9. The court acknowledged the "dreadful predicament" and "horrible dilemma" the subpoena had thrust upon the priest:

> If he tells the truth he violates his ecclesiastical oath—If he prevaricates he violates his judicial oath—Whether he lies, or whether he testiffies (sic) the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience. [*Id.* at 103.]

The court's answer was "to declare that [the priest] shall not testify or act at all." *Id.*

The *Phillips* court rested its decision on the First Amendment of the United States Constitution: " 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' " *Id.* at 111. The court proceeded to describe the sacramental

[4] *People v Phillips* was an unpublished case but was reported in full by the priest's attorney in his book: Sampson, *The Catholic Question in America* (1813), pp 1-122.

differences between Catholicism and Protestantism to explain why specifically a Catholic priest should not be forced to testify regarding the content of a confession:

> It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. We have but two in the Protestant Church—Baptism and the Lord's Supper—and they are considered the seals of the covenant of grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? Every man who hears me will answer in the affirmative. Will not the same result follow, if we deprive the Roman catholic of one of his ordinances? Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated. [*Id.*]

Today we perceive a twofold danger in the *Phillips* court's rationale. First, as noted by the *Phillips* prosecution, the distinction between religions seems to serve as a "preference," allowing only Catholic penitents the armor of privilege. See *id.* at 48. Second, by focusing so deeply on the nature of the religious rite, the court, an arm of the government, immersed itself in a doctrinal debate of the most sensitive nature. In the nearly 200 years since *Phillips* was decided, all 50 states have enacted statutes or evidentiary rules, and the federal government has accepted as a part of its common law, regulations that resolve the first danger—everywhere in this nation, any penitent speaking to any clergyman of any denomination enjoys an evidentiary privilege precluding the use in court of his or her

"confession," or sometimes more broadly the penitent's "communication."[5] By adopting rules of privilege, the states and federal government have rendered unnecessary further inquiry into religious doctrine.

In 1846, a mere nine years after Michigan was admitted to statehood, our Legislature enacted the

[5] Under the Federal Rules of Evidence, the privilege of a witness is governed by the common law unless the United States Constitution, a federal statute, or a United States Supreme Court rule provides otherwise. FRE 501. Several United States circuit courts of appeals have expressly addressed the issue of cleric-congregant communications and found a common-law privilege. See *Varner v Stovall*, 500 F3d 491, 495-496 (CA 6, 2007); *Cox*, 296 F3d at 102-105; *Mockaitis v Harcleroad*, 104 F3d 1522, 1531-1533 (CA 9, 1997); *Grand Jury Investigation*, 918 F2d at 378-385; *United States v Dube*, 820 F2d 886, 889-890 (CA 7, 1987).

Our sister states have all enacted statutes or court rules governing the cleric-congregant privilege: (Alabama) Ala R Evid Rule 505; (Alaska) Alas R Evid 506; (Arizona) Ariz Rev Stat Ann 13-4062; (Arkansas) Ark R Evid 505; (California) Cal Evid Code 917, 1033, 1034; (Colorado) Colo Rev Stat 13-90-107; (Connecticut) Conn Gen Stat Ann 52-146b (2012); (Delaware) Del R Evid 505; (Florida) Fla Stat 90.505; (Georgia) Ga Code Ann 24-9-22; (Hawaii) Hawaii R Evid 506; (Idaho) Idaho Code Ann 9-203; Idaho R Evid 505; (Illinois) 735 Ill Comp Stat 5/8-803; (Indiana) Ind Code 34-46-3-1; (Iowa) Iowa Code 62.10(1); (Kansas) Kan Stat Ann 60-429; (Kentucky) Ky R Evid 505; (Louisiana) La Code Evid Ann art 511; (Maine) Me R Evid 505; (Maryland) Md Code Ann, Cts & Jud Proc 9-111; (Massachusetts) Mass Gen Laws ch 233, § 20A; (Minnesota) Minn Stat 595.02; (Mississippi) Miss R Evid 505; (Missouri) Mo Rev Stat 491.060; (Montana) Mont Code 26-1-804; (Nebraska) Neb Rev Stat 27-506; (Nevada) Nev Rev Stat 49.255; (New Hampshire) NH R Evid 505; (New Jersey) NJ Stat Ann 2A:84A-23; (New Mexico) NM R Evid 11-506; (New York) NY CPLR 4505; (North Carolina) NC Gen Stat 8-53.2; (North Dakota) ND R Evid 505; (Ohio) Ohio Rev Code Ann 2317.02; (Oklahoma) Okla St tit 12, § 2505; (Oregon) Or Rev Stat 40.260; (Pennsylvania) 42 Pa Cons Stat 5943; (Rhode Island) RI Gen Laws 9-17-23; (South Carolina) SC Code Ann 19-11-90; (South Dakota) SD Codified Laws 19-13-16 and 19-13-17; (Tennessee) Tenn Code Ann 24-1-206; (Texas) Tex R Evid 505; (Utah) Utah Code Ann 78B-1-137, Utah R Evid 503; (Vermont) Vt Ct R Ann 505; (Virginia) Va Code Ann 8.01-400; (Washington) Wash Rev Code 5.60.060; (West Virginia) W Va Code 48-1-301; (Wisconsin) Wis Stat 905.06; (Wyoming) Wy Stat Ann 1-12-101.

precursor of the modern MCL 600.2156.[6] That statute now provides:

> No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.[7]

More than 100 years later, in 1949, the Michigan Legislature enacted the evidentiary privilege of MCL 767.5a(2), which now provides:

> Any communications between attorneys and their clients, *between members of the clergy and the members of their respective churches*, and between physicians and their patients are hereby *declared to be privileged and confidential when those communications were necessary to enable* the attorneys, *members of the clergy*, or physicians *to serve as such* attorney, *member of the clergy*, or physician. [MCL 767.5a(2), as amended by 1986 PA 293 (emphasis added).]

IV. WHEN THE PRIVILEGE APPLIES UNDER MICHIGAN LAW

Both the prosecution and the defense focus their arguments on the elements of MCL 600.2156, which governs a cleric's disclosure of confessions. We find such a limited view inappropriate. MCL 767.5a is a more recent enactment and more specifically governs the evidentiary use of a "privileged and confidential" communication.

We begin by outlining the rules of statutory interpretation relevant to our analysis. MCL 600.2156 and MCL 767.5a(2) relate to a similar subject matter and share a

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[6] 1846 RS, ch 102, § 85.

[7] MCL 600.2156, as amended by 1962 PA 187. The Legislature's only alteration since enacting the 1846 statute was to include "duly accredited Christian Science practitioner[s]" within the statutory ambit.

similar goal—to protect the secrecy of statements made by a congregant to his or her cleric. "[S]tatutes that relate to the same subject or that share a common purpose are *in para materia* [sic] and must be read together as one." *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007) (quotation marks and citation omitted). If the two statutes appear to conflict, however, a newer statute prevails over the older. This is because " 'the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.' " *Feezel*, 486 Mich at 211 (citation omitted). We remain mindful that seemingly similar statutes may govern under very different circumstances. In *Grimes v Dep't of Transp*, 475 Mich 72, 85; 715 NW2d 275 (2006), for example, our Supreme Court cautioned against importing definitions from the Michigan Vehicle Code, MCL 257.1 *et seq.*, into the highway exception to governmental immunity, MCL 691.1402, as the two statutes serve very different purposes. Specifically, the Supreme Court warned that "reliance on an unrelated statute to construe another is a perilous endeavor to be avoided by our courts." *Grimes*, 475 Mich at 85. Further, when two statutes appear to control a particular situation, the more recent and more specific statute applies. *Buehler*, 477 Mich at 26.

The statutes at issue fall within two separate codes within our compiled laws. MCL 600.2156, the successor of this state's original 1846 statute, is found among the evidence provisions of chapter 21 of the Revised Judicature Act, MCL 600.2101 *et seq*. It is flanked by statutes excusing a witness from giving an answer that may incriminate him criminally, MCL 600.2154, and describing the circumstances under which a patient waives a doctor-patient privilege, MCL 600.2157. MCL 767.5a, on the other hand, is part of chapter VII of the

Code of Criminal Procedure, MCL 767.1 *et seq*. The chapter heading indicates that it contains statutes governing "grand juries, indictments, informations and proceedings before trial." MCL 767.5a is flanked by statutes governing the contempt of witnesses who fail to appear or refuse to answer questions, MCL 767.5, and permitting witnesses to avoid self-incrimination absent a grant of immunity, MCL 767.6. MCL 600.2156, MCL 767.5a, and their neighboring statutes all deal with a single, general concept—a witness's duty to testify upon summons from the court and the situations under which a witness may not, cannot, or is excused from testifying as otherwise directed. These are not wholly unrelated statutes as described in *Grimes*, 475 Mich at 85, and therefore must be read in harmony. *Manning v East Tawas*, 234 Mich App 244, 249; 593 NW2d 649 (1999), citing *Jennings v Southwood*, 446 Mich 125, 136-137; 521 NW2d 230 (1994).

Pursuant to MCL 600.2156, a cleric is not permitted to "disclose" certain statements made to him or her. To "disclose" means to "bring into view by uncovering; to expose; to make known . . . ." Black's Law Dictionary (6th ed), p 464; see also *Webster's New World Dictionary of the American Language* (2d college ed), p 401. The Legislature's use of the broad term "disclose" precludes a cleric from revealing the covered statements to anyone, not simply before a court of law.

MCL 767.5a(2), on the other hand, uses more specific legal terms by "declar[ing]" any covered communication "to be privileged and confidential." In legal parlance, "privileged communications" are "[t]hose statements made by certain persons within a protected relationship such as . . . priest-penitent . . . which the law protects from forced disclosure on the witness stand . . . ." Black's (6th ed), p 1198; see also *Webster's*,

p 1131 (stating that a "privileged communication" is a statement "that one cannot legally be compelled to divulge, as that to a lawyer from his client"). "Confidential communication[s]" include "[p]rivileged communications such as those between . . . confessor-penitent" but also include "statement[s] made under circumstances showing that [the] speaker intended [the] statement only for [the] ears of [the] person addressed . . . ." Black's (6th ed), p 298; see also *Webster's*, p 297 (stating that "confidential" means "told in confidence; imparted in secret").

Read together and harmonized, the more specific MCL 767.5a(2) creates an evidentiary privilege, precluding the incriminatory use of "any communication" made by a congregant to his or her cleric when that communication was "necessary to enable the" cleric "to serve as such" cleric. That statute governs the specific use of a defendant's statements against him or her in court. MCL 600.2156 more broadly precludes a cleric from disclosing certain covered communications in other situations, not limited to the courtroom. It does not qualify as an evidentiary privilege.

The evidentiary privilege enacted by the Legislature is broader than MCL 600.2156 in one important sense. MCL 600.2156 only precludes the disclosure of "confessions," while the evidentiary privilege of MCL 767.5a(2) addresses the use of "any communication."[8] Accord-

[8] We note that this Court improperly omitted a discussion of MCL 767.5a in *Wirtanen v Prudential Life Ins Co of America*, 27 Mich App 260; 183 NW2d 456 (1970), and therefore reached an incomplete conclusion regarding the admissibility of a Lutheran minister's testimony. The *Wirtanen* plaintiffs brought suit to collect under their deceased son's life insurance policy. *Id.* at 262. The deceased had died several days after suffering a self-inflicted gunshot wound. The plaintiffs claimed accidental death, which was covered by the policy, but the insurance company claimed suicide, which was not. *Id.* at 262-264. In support of its suicide

ingly, contrary to the arguments of the prosecution and the defense, it is irrelevant whether defendant's statements to Vaprezsan fall within the definition of a confession. The provisions of MCL 600.2156 are useful, however, in determining when a communication is necessary to enable a cleric to serve as a cleric. For instance, a communication is likely necessary to allow a cleric to serve as a cleric if the statement is made to the cleric in his or her professional capacity or is made "in the course of discipline enjoined by the rules or practice of" the cleric's denomination.

V. WHEN A COMMUNICATION IS PRIVILEGED UNDER MCL 767.5a(2)

A. NECESSARY TO ENABLE THE CLERIC TO SERVE AS A CLERIC

For the evidentiary privilege of MCL 767.5a(2) to apply, the communication must have been "necessary to enable" Vaprezsan "to serve as such . . . member of the clergy." This phrase has never been defined by this Court or the Michigan Supreme Court. We find guidance in the attempts of our sister states and the federal courts to define the parameters of their own statutes

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claim, the insurance company presented the testimony of a minister who had visited the deceased in the hospital. The trial court permitted the insurer to ask the minister whether the deceased had told him what had happened, and the minister responded in the affirmative. The court did not permit the insurer to elicit the contents of that conversation. *Id.* at 264-265. This Court held that the question improperly left the jury to speculate. *Id.* at 269. In relation to MCL 600.2156, this Court held: "The minister was a competent witness. The statute does not bar testimony by a clergyman with knowledge of relevant and admissible facts as such. It does bar any confessions made to him in his professional character." *Id.* Had this Court properly considered MCL 767.5a as well, it could have noted that any communication, not just a confession, would be barred from the trial as long as the communication was necessary to allow the minister to serve as a minister. As *Wirtanen* was decided before November 1, 1990, we are not limited by its incomplete analysis. MCR 7.215(J)(1).

and common-law rules. From those cases, we glean that a communication is necessary to enable a cleric to serve as a cleric if the communication serves a religious function such as providing guidance, counseling, forgiveness, or discipline.

In *Cox*, 296 F3d at 106, the United States Court of Appeals for the Second Circuit directed that "a communication must be made in confidence and for the purpose of obtaining spiritual guidance" in order to be privileged. (Quotation marks and citation omitted.) Put another way, a conversation is not privileged if made "with wholly secular purposes solely because one of the parties to the conversation happens to be a religious minister." *Id.* (quotation marks and citation omitted). In *Cox*, the defendant told seven members of his Alcoholics Anonymous (AA) group that he had broken into a house six years earlier and murdered the residents. *Id.* at 91. The defendant alleged that he made these "confessions" as part of the fourth and fifth steps of the AA program: "to undertake 'a searching and fearless moral inventory' and to 'admit[] to God, to [himself], and to another human being the exact nature of [his] wrongs.' " *Id.* The *Cox* panel assumed that AA qualified as a religion, *id.* at 107, but rejected the defendant's claim that his statements were made to fellow members to seek spiritual guidance. Rather, the defendant's statements to his fellow AA members were made for secular purposes, such as an "emotional outpouring to a lover," pursuing advice on the procedural method of "handl[ing] the fourth step" of the program, and seeking "practical and legal, not spiritual, advice." *Id.* at 110.

The Utah Supreme Court in *Scott v Hammock*, 870 P2d 947, 956 (Utah, 1994), similarly held that the term "confession" as used in that state's statute included communications "made in confidence and for the pur-

pose of seeking or receiving religious guidance, admonishment, or advice . . . .” The court acknowledged that a cleric, serving in the role of a cleric, must engage in many communications that would not necessarily be deemed a “confession” but should nevertheless fall within the privilege.

> [A] constricted interpretation of the privilege does not take into account the essential role that clergy in most churches perform in providing confidential counsel and advice to their communicants in helping them to abandon wrongful or harmful conduct, adopt higher standards of conduct, and reconcile themselves with others and God. Indeed, even when confession is part of an essential sacrament, as in the Catholic Church, clergy must still give confidential guidance concerning the moral faults of their parishioners pursuant to their responsibility to give spiritual and religious advice, counsel, and admonishment. In counseling parishioners in religious and moral matters, clergy frequently must deal with intensely private concerns, and parishioners may be encouraged, and even feel compelled, to discuss their moral faults. . . . “Because most churches do not set aside formal occasions for special private encounters labeled ‘confession,’ less formal consultation must be privileged if the privilege is not in effect to be limited to Roman Catholics.” [*Id.* at 952 (citations omitted).]

In *Scott*, the Utah Supreme Court held that the defendant’s statements to his Church of Jesus Christ of Latter-Day Saints (LDS) bishop made during conversations tied to the church’s “repentance process” “concerned an issue pertaining to [the defendant’s] moral conduct” and were made to the bishop “acting in his role as a cleric.” *Id.* at 956.

B. COMMUNICATION TO A CLERIC IN HIS OR HER “PROFESSIONAL CHARACTER”

As noted, the elements of MCL 600.2156 are also useful in determining whether a communication is

necessary to enable a cleric to serve as a cleric. Particularly, if a congregant imparts a communication to a cleric in the cleric's "professional character," that communication is likely "necessary to enable" the cleric to serve as a cleric. "The 'professional character' element requires the communication to be directed to a clergyman in his or her capacity as a spiritual leader within his or her religious denomination." *State v Archibeque*, 223 Ariz 231, 235; 221 P3d 1045 (Ariz App, 2009). In *Archibeque*, the defendant admitted to his LDS bishop that he had sexually assaulted his stepdaughter. *Id.* at 233-234. The Arizona Court of Appeals held that the statement was made to the bishop in his professional character because the defendant spoke with the bishop as part of the church's repentance process. *Id.* at 235.

In *In re Roman Catholic Archbishop of Portland*, 335 BR 815, 829 (D Or, 2005), a bankruptcy judge found the phrase "professional character" to be ambiguous. Noting that the purpose of the privilege was to "allow[] and encourage[] individuals to fulfill their religious, emotional or other needs," the judge determined that the privilege should only protect communications to a cleric acting as "a spiritual advisor." *Id.* at 829-830. In reaching this determination, the judge cited several examples of communications that had been deemed outside a cleric's professional capacity. *Id.* at 830, citing *Masquat v Maguire*, 1981 OK 137; 638 P2d 1105, 1106 (1981) (concluding that the plaintiff hospital employee communicated with a Catholic nun in her capacity as hospital administrator, not in her religious role, so the communication was not within the privilege), *Bonds v State*, 310 Ark 541, 544-546; 837 SW2d 881 (1992) (determining that the defendant's communication with a minister who was also the defendant's employer at an air conditioning business was made to the minister in his capacity as an employer, not as a spiritual advisor),

and *State v Cary*, 331 NJ Super 236, 246-247; 751 A2d 620 (2000) (noting that the defendant had no reasonable expectation of privacy when his conversation with the church deacon occurred after the defendant was ready to surrender and the deacon had introduced himself as a state trooper, advised the defendant of his right to remain silent, and conducted a pat-down search). See also *State v Martin*, 137 Wash 2d 774, 785 n 65; 975 P2d 1020 (1999), citing *People v McNeal*, 175 Ill 2d 335, 358-359; 677 NE2d 841 (1997) (noting that although the defendant's brother was a minister, the communication was not made to the brother in his ministerial capacity, as evidenced by the brother grabbing the defendant, eliciting an admission, and promptly ending the conversation), and *State v Barber*, 317 NC 502; 346 SE2d 441 (1986) (concluding that the defendant's confession was made to a friend and coworker and not in connection with the friend's role as a former minister).

In *Vickers v Stoneman*, 73 Mich 419, 423-424; 41 NW 495 (1889) (CAMPBELL, J., concurring), a minority of our Supreme Court more generally noted that "[o]ne O. S. Paddock, a minister, who visited defendant in that capacity, related conversations directly connected with defendant's religious experiences." The concurring justices opined that this evidence was privileged because it had been imparted to the minister in his professional character and should not have been admitted to prove publication of slander.

Our canvass of relevant caselaw can be reduced to one essential and basic maxim: For a communication to be made to a cleric in his or her professional capacity, the congregant must speak to the cleric as part of the cleric's "job" as a cleric. The congregant cannot speak to the cleric

in his or her role as a relative, friend, or employer and receive the benefit of the evidentiary privilege.

C. COMMUNICATION MADE IN THE COURSE OF DISCIPLINE ENJOINED BY THE RULES OR PRACTICE OF THE DENOMINATION

A communication made as part of the discipline enjoined by the cleric's denomination would also likely be "necessary to enable" a cleric to serve as a cleric.[9] This element poses the danger, however, of improperly invoking the court's consideration and determination of a religion's parameters. In civil matters, the United States Supreme Court has repeatedly instructed that our secular judiciary must avoid resolving controversies about a religion's or church's internal governance or operating procedures. See *Hosanna-Tabor Evangelical Lutheran Church & Sch v Equal Employment Opportunity Comm*, 565 US ___; 132 S Ct 694; 181 L Ed 2d 650 (2012); *Serbian Eastern Orthodox Diocese for the United States of America & Canada v Milivojevich*, 426 US 696; 96 S Ct 2372; 49 L Ed 2d 151 (1976). Our consideration of a particular religion's stance on confidential communications and the role or duty of its clerics would similarly offend First Amendment principles. Accordingly, when considering whether a communication would be considered confidential under the discipline or practices of a specific religion, we are bound to accept the guidance provided by the clerical witness without embarking on a fact-finding mission.

To the extent that we may consider whether a communication was made in the course of discipline enjoined by the rules or practice of a particular denomi-

[9] In *People v Pratt*, 133 Mich 125, 133; 94 NW 752 (1903), our Supreme Court noted in dicta that a "confession[] of crime made . . . to a priest, not in accordance with the discipline of his church, would be competent" evidence.

nation, we find instructive *In re Contempt of Swenson*, 183 Minn 602, 604-605; 237 NW 589 (1931), which held:

> The word "discipline" has various meanings. It may relate to education. It involves training and culture. It may mean training in moral rectitude, and it was probably in part so used here. It may refer to rules and duties. The word has no technical, legal meaning and in its common and most general sense signifies instruction, comprehending the communication of knowledge and training, to observe and act in accordance with certain rules or practice, and may include correction. The "discipline enjoined" includes the "practice" of all clergymen to be trained so as to advance such "discipline," to be alert and efficient in submission to duty, to concern themselves in the moral training of others, to be as willing to give spiritual aid, advice or comfort as others are to receive it, and to be keenly concerned in reformatory methods of correction leading towards spiritual confidence. So it is in the course of "discipline enjoined" by the "practice" of their respective churches that the clergyman is to show the transgressor the error of his way; to teach him the right way; to point the way to faith, hope, and consolation; perchance, to lead him to seek atonement.
>
> The statute has a direct reference to the church's "discipline" of and for the clergyman and as to his duties as enjoined by its rules or practice. It is a matter of common knowledge, and we take judicial notice of the fact, that such "discipline" is traditionally enjoined upon all clergymen by the practice of their respective churches. Under such "discipline" enjoined by such practice all faithful clergymen render such help to the spiritually sick and cheerfully offer consolation to suppliants who come in response to the call of conscience. The courts also take judicial notice of the numerous sects and the general doctrine maintained by each.
>
> It is important that the communication be made in such spirit and within the course of "discipline"; and it is sufficient, whether such "discipline" enjoins the clergyman to receive the communication or whether it enjoins the

> other party, if a member of the church, to deliver the communication. Such practice makes the communication privileged, when accompanied by the essential characteristics, though made by a person not a member of the particular church or of any church. [Citations omitted.]

Interpreting a similarly worded statute, the Washington Supreme Court approved the Washington Court of Appeals' determination that "it is the 'clergy member receiving the confidential communication [who must] be enjoined by the practices or rules of the clergy member's religion to receive the confidential communication and to provide spiritual counsel' . . . ." *Martin*, 137 Wash 2d at 784 (citation omitted) (alteration in original). In describing the general scope of the course of discipline, the Utah Supreme Court hesitated to define the phrase too strictly lest it inadvertently show preference to one religion over another and thereby violate the Establishment Clause:

> [A] constricted interpretation of the privilege does not take into account the essential role that clergy in most churches perform in providing confidential counsel and advice to their communicants in helping them to abandon wrongful or harmful conduct, adopt higher standards of conduct, and reconcile themselves with others and God. Indeed, even when confession is part of an essential sacrament, as in the Catholic Church, clergy must still give confidential guidance concerning the moral faults of their parishioners pursuant to their responsibility to give spiritual and religious advice, counsel, and admonishment. In counseling parishioners in religious and moral matters, clergy frequently must deal with intensely private concerns, and parishioners may be encouraged, and even feel compelled, to discuss their moral faults. As one commentator has stated, "Because most churches do not set aside formal occasions for special private encounters labeled 'confession,' less formal consultation must be privileged if the privilege is not in effect to be limited to Roman Catholics." [*Scott*, 870 P2d at 952 (citations omitted).]

Even in a "counseling" session with a cleric, the congregant might make many "confidential" disclosures amounting to the confession of sin or other privileged communications. The informality of the meeting should not define the scope of the privilege. *Id.* at 953.

D. DEFENDANT'S STATEMENTS TO VAPREZSAN WERE PRIVILEGED AND CONFIDENTIAL

Defendant's statements to Vaprezsan fall within the statutory scope of privileged and confidential communications under MCL 767.5a(2). The communication was necessary to enable Vaprezsan to serve as a pastor because defendant communicated with Vaprezsan in his professional character in the course of discipline enjoined by the Baptist Church.

The communication between defendant and Vaprezsan served a religious function—it enabled Vaprezsan to provide guidance, counseling, forgiveness, and discipline to defendant. Vaprezsan testified that he wanted "to get [defendant] some help," and the first step necessitated that defendant admit his actions. Vaprezsan averred that he "consoled" defendant and counseled him as "a loving broken hearted minister."

Vaprezsan also spoke with defendant in his "professional character" as a pastor. Vaprezsan explicitly stated that he "interrogate[d]" defendant "[i]n [his] role as a pastor." Once Vaprezsan convinced defendant to speak about the sexual assault, the pastor prayed with defendant. This was not a secular conversation. If Vaprezsan had not been a pastor, the communication would not have occurred. Because of Vaprezsan's authority as the church pastor, he was able to summon defendant and his mother to the church office and expect their attendance. Inside the pastor's office, the trio did not discuss secular topics such as K.'s employ-

ment at the church. They spoke only of the victim's accusation that defendant had committed a sin and a criminal act against her.

The communication was also made in the course of discipline enjoined by the Baptist Church. Vaprezsan learned during his religious training that confidential communication is essential to create trust between congregants and their minister. The Baptist Church taught Vaprezsan that "[t]here's no need in others knowing personal matters, that are discussed with" their pastor. Vaprezsan testified that under Baptist doctrine, his communication with defendant would be considered confidential, and yet Vaprezsan claimed that his sharing defendant's communication with the police and the victim's family did not violate that confidence. Vaprezsan denied that praying with his congregants was part of his "duties as a pastor" of the Baptist Church, instead characterizing his act of praying with defendant as being "part of what's right" and "very biblical." Vaprezsan also testified that providing counseling and guidance services are a part of his role as a Baptist minister.

The record clearly establishes that defendant's communication to Vaprezsan falls within MCL 767.5a(2)'s scope. The communication was therefore privileged and confidential. Vaprezsan was not permitted to divulge the content of the communication at the preliminary examination, and the circuit court correctly precluded any further use of that evidence.

E. EFFECT OF PASTOR'S INITIATION OF CONVERSATION

Despite the obvious nature of defendant's communication, the prosecution maintains that it does not amount to a privileged "confession" because the cleric initiated the conversation, not the congregant. How-

ever, as already noted, MCL 767.5a(2) extends its privilege to covered "communications," not just confessions. The term "communication" in no way suggests that the congregant must initiate the conversation in order for the privilege to apply.

We find instructive cases from two sister states. In *State v Johnson*, 497 NYS2d 539: 115 AD2d 973 (1985), the defendant admitted to fellow members of his Muslim mosque that he had killed his wife. "Although confidential communications between a Muslim brother acting as a spiritual advisor may, in some cases, be privileged," the court held that the defendant did not communicate for "the purpose of seeking religious counsel, advice, solace, absolution or ministration." *Id.* at 539-540.

> Defendant did not initiate the conversations but, rather, they were initiated by members of the mosque who testified that they were motivated by fear that defendant might be dangerous, and their desire to get him out of the mosque. Defendant was interrogated by members of the mosque, and he denied involvement in his wife's death. Following further questioning, defendant admitted that he killed his wife. [*Id.* at 540.]

In *Johnson*, the communication was not exempted from the privilege because the defendant's Muslim brothers initiated the conversation. Rather, the communication was exempted because it was made for a secular purpose. The Muslim brothers elicited the defendant's communication because they feared for their own safety and the safety of other community members.

In *State v Diercks*, 88 Ill App 3d 1073, 1074; 411 NE2d 97 (1980), the defendant burglarized a Baptist church. The church's pastor visited the jail on three occasions to speak with the defendant. During one visit, the defendant admitted his guilt. The prosecution ar-

gued that the privilege was inapplicable because the defendant did not initiate the conversation. *Id.* at 1077. The court ultimately found the privilege inapplicable on other grounds. However, the court concluded that the identity of the initiator did not govern whether the privilege applied. *Id.*

We agree with the New York and Illinois courts that it is irrelevant to the statutory-privilege analysis that Vaprezsan initiated the conversation. Regardless of the initiator's identity, the communication was necessary to enable Vaprezsan to serve as a pastor and the MCL 767.5a(2) privilege applies.

VI. DEFENDANT DID NOT WAIVE THE CLERIC-CONGREGANT PRIVILEGE

The prosecution contends that any privilege attached to defendant and Vaprezsan's communication must be deemed waived by K.'s presence. It is well settled that privileges belong to the holder alone and may be waived only by the holder. See *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 34; 594 NW2d 455 (1999), and *People v Williams*, 39 Mich App 91, 92-93; 197 NW2d 336 (1972) (doctor-patient privilege); *Paschke v Retool Indus*, 445 Mich 502, 518 n 15; 519 NW2d 441 (1994); and *People v Nash*, 418 Mich 196, 219; 341 NW2d 439 (1983) (attorney-client privilege). The same is true of the cleric-congregant privilege: "The privilege of the confessional is the privilege of the penitent . . . ." *People v Lipsczinska*, 212 Mich 484, 493; 180 NW 617 (1920).

In criminal matters, "[w]aiver is the intentional relinquishment or abandonment of a known right or privilege." *People v Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006). Yet a privilege may be deemed waived if the defendant fails to assert it. *People v Watkins*, 468 Mich 233, 235; 661 NW2d 553 (2003) (regarding a

defendant's privilege against forced self-incrimination). And with any privilege, the holder may waive it "through conduct that would make it unfair for the holder to insist on the privilege thereafter." *Howe*, 440 Mich at 214; see also *People v Toma*, 462 Mich 281, 319-320; 613 NW2d 694 (2000) (noting that a criminal defendant who raises an insanity defense cannot fairly raise the psychologist-patient privilege and that a defendant who has placed his or her mental health at issue in this manner must be deemed to have waived the privilege).

A defendant may expressly or impliedly waive both the attorney-client and doctor-patient privileges. A criminal defendant waives the attorney-client privilege by claiming ineffective assistance of counsel. *People v Houston*, 448 Mich 312, 332; 532 NW2d 508 (1995), quoting 8 Wigmore, Evidence (McNaughton rev), § 2327, pp 636-638. A civil litigant may waive the privilege by bringing a claim that directly places the privileged information at issue. *Howe*, 440 Mich at 218-223. A client also waives the privilege by referring to an otherwise privileged conversation on the record *Guilty Plea Cases*, 395 Mich 96, 127; 235 NW2d 132 (1975), or disclosing the conversation to third parties, *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997). Pursuant to MCL 600.2157, a patient waives the doctor-patient privilege by seeking recovery for personal injury or malpractice and producing the physician as a witness.

Similarly, a congregant may waive the cleric-congregant privilege by "giving evidence of what took place at the confessional," *Lipsczinska*, 212 Mich at 493, or sharing the content of the otherwise privileged communication with a third party, see *id.* at 494 (noting that the defendant told an undercover detective posing

as a fellow inmate that she had confessed the details of her crime to a Catholic priest). See also *Dube*, 820 F2d at 890 (concluding that the defendant could claim no privilege over his discussions with a fellow minister regarding his religious-based attempts to avoid income tax responsibility because the defendant had had the same discussions with his secular employer, the Internal Revenue Service, and two congressmen).

Defendant did nothing to expressly waive the cleric-congregant privilege in this case, nor did he take any action from which the court could deem the privilege waived. Defendant timely asserted the privilege in the district court. He did not place the content of his communication with Vaprezsan at issue before the court, nor did he introduce it into the record. And defendant never shared the content of his communication with anyone else. It is irrelevant that defendant's mother told a relative and friend about the communications and that Vaprezsan told the victim's family and the police. The privilege was personal to defendant, and neither K.'s nor Vaprezsan's actions implicate a waiver by defendant.

The prosecution contends that K.'s presence during Vaprezsan's conversation with defendant destroyed any claim to confidentiality or privilege, essentially serving as a waiver of the privilege. Other jurisdictions have held that for the cleric-congregant privilege to apply, the communication must have been made in private. The presence of a third party negates the privilege unless that person is essential for the communication to occur. *Grand Jury Investigation*, 918 F2d at 376, 386; *Martin*, 137 Wash 2d at 787; *Scott*, 870 P2d at 955.

However, the presence of a close relation does not necessarily vitiate the cleric-congregant privilege. In *Archibeque*, 223 Ariz at 233, the defendant's wife was

present when he confessed his acts of child sexual abuse to his LDS bishop. The court held that the

> presence of a third person will usually defeat the privilege on the ground that confidentiality could not be intended with respect to communications that the speaker knowingly allowed to be overheard by others foreign to the confidential relationship. However, this rule does not apply when the presence of a third party does not indicate a lack of intent to keep the communication confidential. . . . [T]he relevant inquiry [is] whether the communicant reasonably understood the communication to be confidential notwithstanding the presence of third parties. [*Id.* at 236 (quotation marks and citations omitted).]

The Arizona Court of Appeals concluded that the communication was confidential despite the presence of the defendant's wife. The pair met with the bishop in the seclusion of the bishop's office. The bishop described his role as assisting the repentance process and providing spiritual guidance for the family as a whole, as well as spiritual counseling for the marriage. The court determined that the communication was confidential based on "the nature of the meeting and the relationships between the parties . . . ." *Id.*

Michigan courts have similarly rejected blanket policies under which the presence of a third party automatically waives a privilege. In *Bassil*, 278 Mich at 178, the Court refused to deem the doctor-patient privilege waived by the presence of the patient's wife, holding that "[t]he presence of one sustaining an intimate family relation with the patient when consulting a physician should not and does not waive the privilege." In relation to the attorney-client privilege, this Court has upheld the confidential nature of a communication when the minor client's agents (her parents) were present during all meetings. *Grubbs v K mart Corp*, 161 Mich App 584, 589; 411 NW2d 477 (1987).

K.'s presence did not destroy the confidentiality of the conversation between defendant and Vaprezsan. Defendant was a minor when Vaprezsan summoned him and K. to the church office. If the claimed privilege had related to the doctor-patient or attorney-client relationship, the presence of a minor patient or client's parent would have certainly been deemed necessary and would not have vitiated the privilege. So too with the cleric-congregant privilege. As defendant's parent, K. could sustain defendant during this difficult conversation. Moreover, there is no record indication that defendant, or even Vaprezsan, believed that K.'s presence destroyed the confidentiality of their communication. K., defendant, and Vaprezsan met in a closed-door meeting late at night. Those conditions support an understanding of confidentiality.

As the evidentiary privilege of MCL 767.5a(2) applies under the circumstances and defendant did not waive that privilege, the circuit court properly precluded the use of Vaprezsan's testimony at defendant's upcoming trial.

Affirmed.

METER and DONOFRIO, JJ., concurred with GLEICHER, P.J.

SPOHN v VAN DYKE PUBLIC SCHOOLS

Docket No. 301196. Submitted March 13, 2012, at Detroit. Decided May 8, 2012, at 9:05 a.m.

Cindy Spohn brought an action in the Macomb Circuit Court against the Van Dyke Public Schools, Edie T. Burks, Mark Skrzynski, Donald Colpaert, and Kathleen Spaulding, alleging that she was subjected to sexual harrassment in violation of Michigan's Civil Rights Act, MCL 37.201 *et seq*. Burks, Skrzynski, Spaulding, and the school district moved for summary disposition, asserting that Spohn was judicially estopped from pursuing her sexual harassment claim because she had failed to identify the claim as an asset in a Chapter 13 bankruptcy proceeding that she had previously filed, 11 USC 1301 *et seq*. Colpaert subsequently concurred with and joined the motion for summary disposition. The alleged incidents of sexual harassment occurred from September 2008 through the beginning of December 2008. Spohn and her husband filed the joint petition for Chapter 13 bankruptcy on November 27, 2008, in the United States Bankruptcy Court for the Eastern District of Michigan. They filed their proposed bankruptcy plan on December 9, 2008. The plan did not refer to Spohn's potential claim for sexual harassment. January 6, 2009, was Spohn's final day of work with the school district. On that same day, Spohn's husband contacted an attorney to discuss whether Spohn had a claim against the school district. The bankruptcy court subsequently confirmed Spohn's Chapter 13 plan. In May 2009, Spohn's attorney with regard to her sexual harassment claim sent a letter to the school district proposing a settlement of the claim. On August 26, 2009, because of the failure of Spohn and her husband to make payments in accordance with their Chapter 13 plan, the Chapter 13 Standing Trustee for the United States Bankruptcy Court for the Eastern District of Michigan, Tammy L. Terry, moved to dismiss the plan. Spohn and her husband initially filed a response to the trustee's motion, but withdrew it on September 28, 2009, the same day that Spohn filed her sexual harassment complaint in the circuit court. The bankruptcy court formally dismissed Spohn and her husband's Chapter 13 petition on March 11, 2010. The circuit court, Donald G. Miller, J., granted summary disposition in favor of defendants, concluding that Spohn was judicially estopped from bringing her sexual harassment claim because she had not disclosed it during the

bankruptcy proceeding. The circuit court also denied Spohn's motion for reconsideration. Spohn appealed.

The Court of Appeals *held*:

1. Judicial estoppel is an equitable doctrine that generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Under the prior-success model of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding; there must be some indication that the court in the earlier proceeding accepted that party's position as true, and the claims must be wholly inconsistent.

2. To support a finding of judicial estoppel in the context of bankruptcy proceedings, the reviewing court must find that (1) the plaintiff assumed a position that was contrary to the one asserted under oath in the bankruptcy proceedings, (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition, and (3) the plaintiff's omission did not result from mistake or inadvertence. In determining whether the plaintiff's conduct resulted from mistake or inadvertence, the reviewing court considers whether (1) the plaintiff lacked knowledge of the factual basis of the undisclosed claims, (2) the plaintiff had a motive for concealment, and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, the reviewing court will look, in particular, at the plaintiff's attempts to advise the bankruptcy court of the omitted claim. By failing to disclose her sexual harassment claim, Spohn assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceeding. The bankruptcy court adopted the contrary position by confirming Spohn's Chapter 13 plan, which did not refer to her potential sexual harassment lawsuit. Spohn's omission did not result from mistake or inadvertence given that Spohn had knowledge of the factual basis of the undisclosed sexual harassment claim, yet she never attempted to advise the bankruptcy court of the existence of that claim, which indicated both concealment and bad faith. Moreover, Spohn received an unfair advantage over her creditors in the bankruptcy action by not disclosing the possible sexual harassment lawsuit.

Affirmed.

ESTOPPEL — JUDICIAL ESTOPPEL — BANKRUPTCY PROCEEDINGS.

To support a finding of judicial estoppel in the context of bankruptcy proceedings, the reviewing court must find that (1) the plaintiff

> assumed a position that was contrary to the one asserted under oath in the bankruptcy proceedings, (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition, and (3) the plaintiff's omission did not result from mistake or inadvertence; in determining whether the plaintiff's conduct resulted from mistake or inadvertence, the reviewing court considers whether (1) the plaintiff lacked knowledge of the factual basis of the undisclosed claims, (2) the plaintiff had a motive for concealment, and (3) the evidence indicates an absence of bad faith; in determining whether there was an absence of bad faith, the reviewing court will look, in particular, at the plaintiff's attempts to advise the bankruptcy court of the omitted claim.

Ihrie O'Brien (by *Harold A. Perakis*) for Cindy Spohn.

Lusk & Albertson, PLC (by *Kevin T. Sutton* and *Robert T. Schindler*), for the Van Dyke Public Schools, Edie T. Burks, Mark Skrzynski, and Kathleen Spaulding.

Cardelli, Lanfear & Buikema, P.C. (by *Lisa C. Walinske* and *Matthew Scarfone*), for Donald Colpaert.

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM. Plaintiff, Cindy Spohn, appeals as of right the trial court's grant of summary disposition based on judicial estoppel in favor of defendants, Van Dyke Public Schools (VDPS), Edie T. Burks, Mark Skrzynski, Donald Colpaert, and Kathleen Spaulding, on Spohn's claim of workplace sexual harassment. We affirm.

I. FACTS

At the time of the events leading to her workplace sexual harassment claim, Spohn was employed as a

secretary with the Van Dyke Public Schools (VDPS). During the relevant time period, Edie T. Burks was the personnel director for VDPS, Kathleen Spaulding was the superintendent for VDPS, and Mark Skrzynski served as Spohn's direct supervisor at the Thompson Community Center. Donald Colpaert was a teacher at VDPS and is the individual that Spohn accused of engaging in various communications resulting in her sexual harassment claim.

For purposes of this appeal, the facts pertaining to Spohn's underlying claim of sexual harassment are not relevant and will not be addressed because the grant of summary disposition was premised, and is challenged, on the basis of the trial court's determination regarding the applicability of judicial estoppel and Spohn's earlier participation in a Chapter 13 bankruptcy proceeding. Although the parties dispute the significance of various events that occurred during Spohn's underlying lawsuit for sexual harassment and her Chapter 13 bankruptcy proceedings, as well as the trial court's reliance on those events in granting summary disposition, there is no disagreement regarding the actual timeline of the events that transpired.

The alleged incidents of harassment that comprise Spohn's complaint occurred from September 2008 through the beginning of December 2008. Spohn and her husband filed their joint petition for Chapter 13 bankruptcy on November 27, 2008. This was Spohn's fourth petition with the bankruptcy court. Spohn and her husband filed their proposed Chapter 13 bankruptcy plan on December 9, 2008. But the proposed plan did not refer to or mention Spohn's potential lawsuit for sexual harassment or hostile-environment sexual harassment against VDPS and the other defendants in this case.

Spohn's final day of work with VDPS was on January 6, 2009. On that same day, Spohn's husband contacted an attorney to discuss whether Spohn had a potential lawsuit against VDPS.

As part of the Chapter 13 bankruptcy proceedings, Spohn and her husband attended a meeting of creditors on January 14, 2009. While Spohn's husband testified that he had been laid off from work, neither Spohn nor her husband indicated that they were contemplating or pursuing civil litigation pertaining to Spohn's employment with VDPS. Although on January 23, 2009, the Chapter 13 Standing Trustee, Tammy Terry, filed objections to Spohn's bankruptcy plan and sought restrictions premised on the number of Spohn's prior bankruptcy filings, the bankruptcy court ultimately confirmed Spohn's Chapter 13 plan on February 25, 2009. In May 2009, Spohn's attorney wrote a letter to VDPS proposing a settlement of the sexual harassment claim.

Because of Spohn's failure to make payments in accordance with the Chapter 13 plan, the trustee moved to dismiss Spohn's Chapter 13 plan on August 26, 2009. On September 15, 2009, Spohn filed a response to the trustee's motion to dismiss. On September 28, 2009, Spohn initiated the underlying litigation in the Macomb Circuit Court by filing her complaint alleging violation of Michigan's Civil Rights Act (CRA).[1] On that same day, Spohn voluntarily withdrew her response to the trustee's motion to dismiss. The bankruptcy court formally dismissed Spohn's Chapter 13 petition on March 11, 2010. Spohn has acknowledged, under oath, that neither she nor her husband ever disclosed her potential cause of action for sexual harassment while the bankruptcy proceedings were pending.

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[1] MCL 37.2101 *et seq*.

On August 16, 2010, defendants Van Dyke Public Schools, Burks, Skrzynski, and Spaulding moved for summary disposition of Spohn's CRA suit pursuant to MCR 2.116(C)(10). Although Colpaert was not initially included as a party to this motion, he did separately file a responsive brief concurring and seeking to join with the other defendants in pursuing summary disposition. Defendants' only assertion was that Spohn was judicially estopped from pursuing her sexual harassment claim because of her failure to include this potential lawsuit as an asset in the Chapter 13 bankruptcy proceeding. Specifically, defendants argued that Spohn's failure to list her civil lawsuit as an asset established that she asserted a contrary position in the circuit court from that assumed in the bankruptcy court in violation of her duty as a bankruptcy debtor to disclose all potential causes of action. According to defendants, such an inconsistency in her pleadings was sufficient to support judicial estoppel. In addition, defendants argued, because the bankruptcy court "adopted the contrary position either as a preliminary matter or as part of a final disposition," as demonstrated by that court's confirmation of Spohn's Chapter 13 plan, the criteria for judicial estoppel had been met, necessitating dismissal of Spohn's sexual harassment claim.

Spohn contested the propriety of dismissal based on judicial estoppel, asserting that on the date of filing her Chapter 13 plan, she had no reason to believe a viable sexual harassment claim existed. In addition, Spohn argued, based on her inability to pay in conformance with the bankruptcy plan as of April 27, 2009, that it was assumed that her petition would be dismissed, obviating any need for amendment or disclosure. Spohn contended that the bankruptcy trustee's motion for dismissal was granted on October 1, 2009, and that any

delay in the final issuance of an order of dismissal was irrelevant. Finally, Spohn asserted that her failure to disclose the sexual harassment lawsuit in the bankruptcy proceedings did not result in an unfair advantage or any substantial detriment to defendants. Spohn averred that she had no reason or motive to conceal the sexual harassment lawsuit from the bankruptcy court given that it would not have resulted in any financial benefit because her debts were not being discharged in bankruptcy, rather she was on a schedule to pay 100 percent of her outstanding debts, the vast majority of which were secured.

During the hearing on defendants' motion for summary disposition, in response to argument by Spohn's counsel that the failure to disclose the potential lawsuit to the bankruptcy court constituted "mistake or inadvertence" based on the absence of a "motive for concealment," the trial court stated:

> She knew the ins and outs of bankruptcy. This was her fourth bankruptcy.
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> * * *
>
> So she certainly should know, or you would think anybody with normal knowledge would know that if it's a potential asset down the road it's got to be disclosed.
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> * * *
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> Arguably, you are talking about no motive, maybe it would be nice to have the wild card sitting under the blotter somewhere so when all this calms down, okay, now you go ahead with the lawsuit. Would that be a possibility?

During further discourse with the trial court, Spohn's counsel acknowledged that Spohn did not disclose the potential lawsuit to her bankruptcy attorney and did

not amend her bankruptcy petition. Her counsel argued, however, that given Spohn's anticipation that the bankruptcy petition would be dismissed because of her failure to make payments in accordance with the stipulated plan, there was no reason for Spohn to either disclose the potential lawsuit or amend the petition.

In granting summary disposition to defendants, the trial court stated, in relevant part:

> Yeah, she doesn't have to know all the facts, or even the legal basis, to list it on her assets. And she knew about it way back in 2008, 2007 when the actual alleged acts actually occurred in 2007, 2008. So she knew that she possibly had a cause of action at that time.
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> * * *
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> You know, you talk about she's got an obligation to disclose all those assets and potential assets to the bankruptcy court.
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> * * *
>
> And it's certainly contrary to her position here when she didn't disclose such. So I believe that judicial estoppel does apply here, and I'm going to grant the motion.

Spohn moved for reconsideration and to permit an evidentiary hearing in accordance with MCR 2.119(F)(3). Citing as error necessitating the trial court's reconsideration of its ruling, Spohn asserted that the trial court had erred by making a determination of fact that Spohn had benefited from her nondisclosure of the sexual harassment lawsuit to the bankruptcy court, which constituted mere "speculation." Spohn further contended that the trial court had erred by concluding that she would have benefited from that nondisclosure when the relevant bankruptcy laws that applied to her case did not involve a discharge of debts.

Spohn took issue with the trial court's implication that her previous participation in earlier bankruptcy proceedings made her knowledgeable regarding any duty to disclose the potential lawsuit in the bankruptcy court. Finally, Spohn alleged that the trial court erred by finding as a matter of fact that she was aware of her potential sexual harassment cause of action at the time she filed her bankruptcy petition in November 2008. Spohn requested that the trial court conduct an evidentiary hearing "with a bankruptcy expert" in order to assist the trial court "in making a decision that comports with Michigan law as well as bankruptcy law."

In denying Spohn's motion for reconsideration, the trial court indicated that it was "satisfied that the order is proper in all respects" and that Spohn was "attempting to revisit issues that have already been resolved." The trial court separately entered an order denying Spohn's motion for an evidentiary hearing. Spohn now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Although defendants moved for summary disposition pursuant to MCR 2.116(C)(10), Spohn asserts that the trial court's grant of summary disposition based on judicial estoppel was more properly premised on MCR 2.116(C)(7). This Court has recently discussed the standard of review for MCR 2.116(C)(7) and how it is distinguished from MCR 2.116(C)(10):

> Although courts should start with the pleadings when reviewing a motion brought under MCR 2.116(C)(7), courts must also consider any affidavits, depositions, admissions, or other documentary evidence that the parties submit to determine whether there is a genuine issue of material fact. "[T]he trial court [is] obligated to evaluate the specific

> conduct alleged to determine whether a valid exception exists." If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court. *But* if a question of fact exists so that factual development could provide a basis for recovery, caselaw states that dismissal without further factual development is inappropriate. And it is under this latter circumstance—where there are questions of fact necessary to resolve the ultimate issue . . .—that we believe the (C)(7) procedure diverges from the (C)(10) procedure.[2]

We need not determine whether the motion was brought under the correct subrule, because the Court will not reverse a trial court's order if it attained the correct result, albeit for the wrong reason.[3]

This Court reviews de novo a trial court's decision on a motion for summary disposition.[4] When reviewing equitable actions, this Court reviews the trial court's decision de novo.[5]

B. JUDICIAL ESTOPPEL

Judicial estoppel is an equitable doctrine,[6] which "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."[7]

This doctrine is "utilized in order to preserve 'the integrity

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[2] *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010) (citations omitted).

[3] *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

[4] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008).

[5] *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

[6] *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999).

[7] *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 476 (CA 6, 2010) (citation and quotation marks omitted).

> of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.' " *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002); see also *Eubanks*[*v CBSK Fin Group, Inc*, 385 F3d 894, 897 (CA 6, 2004)] ("Judicial estoppel, however, should be applied with caution to 'avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.' ").[8]

Under the "prior success model" of judicial estoppel, "a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding."[9] In accordance with this model of judicial estoppel, "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent."[10] The prior success model, however, "does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits."[11]

More specifically, in the context of bankruptcy proceedings, the federal courts[12] have indicated that

> to support a finding of judicial estoppel, [a reviewing court] must find that: (1) [the plaintiff] assumed a position that was contrary to the one that she asserted under oath in the

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[8] *Id.*

[9] *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994) (citations and quotation marks omitted).

[10] *Id.* at 510.

[11] *Reynolds v Internal Revenue Comm'r*, 861 F2d 469, 473 (CA 6, 1988).

[12] "Although the decisions of lower federal courts are not binding precedents, federal decisions . . . are often persuasive." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 715-716; 742 NW2d 399 (2007) (citation omitted).

> bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the plaintiff's] omission did not result from mistake or inadvertence. In determining whether [the plaintiff's] conduct resulted from mistake or inadvertence, [the reviewing] court considers whether: (1) [the plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [the plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, [the reviewing court] will look, in particular, at [the plaintiff's] "attempts" to advise the bankruptcy court of [the plaintiff's] omitted claim.[13]

1. ASSUMPTION OF CONTRARY POSITION

As stated, to establish the first requirement for the imposition of judicial estoppel, it must be shown that the plaintiff "assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings[.]"[14] In this case, it is undisputed that Spohn did not include her potential sexual harassment lawsuit on her bankruptcy petition and did not amend that petition to list the possible cause of action while the bankruptcy remained pending. This failure to disclose the potential lawsuit was contrary to the bankruptcy code,[15] which requires a debtor to file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs.[16] It is routinely recognized that a potential cause of action constitutes an asset that must be included under 11 USC 521(a)(1)(B)(i).[17] In delineating this obligation, the federal courts have stated:

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[13] *White*, 617 F3d at 478.

[14] *Id.*

[15] 11 USC 101 *et seq*.

[16] 11 USC 521(a)(1)(B).

[17] See *Eubanks*, 385 F3d at 897.

> The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a known cause of action such that it must be disclosed. *Any claim with potential must be disclosed*, even if it is contingent, dependent, or conditional.[18]

Further, " '[t]he duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action'."[19] The disclosure obligations of debtors are considered to be essential to the bankruptcy process:

> The rationale for . . . decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets*. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete*.[20]

Because there is no dispute that Spohn failed to include the sexual harassment claim on her bankruptcy petition, or to amend that petition, the first requirement for the application of judicial estoppel was dem-

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[18] *In re Coastal Plains, Inc*, 179 F3d 197, 208 (CA 5, 1999) (citations and quotation marks omitted).

[19] *Id.*, quoting *Youngblood Group v Lufkin Fed S&L Ass'n*, 932 F Supp 859, 867 (ED Tex, 1996).

[20] *Coastal Plains*, 179 F3d at 208, quoting *Rosenshein v Kleban*, 918 F Supp 98, 104 (SD NY, 1996) (alteration in original).

onstrated because Spohn assumed a position in the bankruptcy proceeding that was contrary to her position in the circuit court.

2. BANKRUPTCY COURT'S ADOPTION OF THE CONTRARY POSITION

To establish the second requirement for the imposition of judicial estoppel, it must be shown that "the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition[.]"[21] To establish "adoption," it must only be shown that the bankruptcy court confirmed Spohn's plan, which did not refer to Spohn's potential sexual harassment lawsuit.[22] Because it is undisputed that the bankruptcy court confirmed Spohn's Chapter 13 plan, the second requirement of "adoption" for judicial estoppel was established.

3. MISTAKE OR INADVERTENCE

To establish the third requirement for the imposition of judicial estoppel, it must be shown that the plaintiff's "omission did not result from mistake or inadvertence."[23] And to determine if a plaintiff's omission constituted "mistake or inadvertence," courts consider whether "(1) she lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of bad faith."[24]

a. LACK OF KNOWLEDGE

As stated, when considering if a plaintiff's omission constituted mistake or inadvertence, courts first con-

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[21] *White*, 617 F3d at 478.

[22] See *id.* at 479.

[23] *Id.* at 478.

[24] *Id*.

sider whether the plaintiff "lacked knowledge of the factual basis of the undisclosed claims[.]"[25] But here, Spohn cannot legitimately dispute that she was aware and had knowledge of the factual basis of the undisclosed claim.

Spohn's own allegations and admissions in the circuit court reveal that the events comprising the substance of her sexual harassment claim primarily occurred from September 2008 through early December 2008. Spohn's Chapter 13 bankruptcy petition was filed on November 28, 2008, with the actual Chapter 13 plan submitted on December 9, 2008. Spohn's final day of work with VDPS was on January 6, 2009. On this same date, Spohn and her husband discussed her potential sexual harassment lawsuit with an attorney. A "debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed."[26] Spohn relinquished her employment with VDPS and spoke with an attorney regarding her sexual harassment claim at least one week before participating in a creditors meeting in the bankruptcy court and before the trustee filed objections to the plan. Spohn's awareness of her potential claim occurred more than one month before her Chapter 13 plan was ultimately confirmed by the bankruptcy court on February 25, 2009. Given the continuing nature of her disclosure obligation, Spohn cannot successfully contend that she was unaware of her potential claim.

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[25] *Id.*

[26] *Coastal Plains*, 179 F3d at 208 (citation and quotation marks omitted).

b. CONCEALMENT

When considering if a plaintiff's omission constituted mistake or inadvertence, courts next consider whether the plaintiff "had a motive for concealment[.]"[27] And in accordance with caselaw, a presumption regarding a motive to conceal exists because "[i]t is always in a Chapter 13 petitioner's interest to minimize income and assets" in order to secure payment directly rather than to the debtor's estate.[28] A debtor loses all rights to his or her property upon filing for bankruptcy.[29] As a result, "the right to pursue causes of action formerly belonging to the debtor . . . vests in the trustee for the benefit of the estate. The debtor has no standing to pursue such causes of action."[30] Spohn's failure to initially disclose her possible lawsuit or to later amend her bankruptcy petition, despite opportunity, suggests a motive for concealment.

Nevertheless, Spohn argues that she lacked a motive to conceal because she was not seeking a discharge in the bankruptcy court as her plan provided for 100 percent payment to her creditors. In support, Spohn submits an affidavit from her bankruptcy attorney. While the affidavit confirms Spohn's assertion that she was involved in a payment plan that would require 100 percent payment of all debts and not a discharge, it does not address the failure to disclose the potential lawsuit. There is no evidence to suggest that Spohn disclosed the existence of the potential lawsuit to her bankruptcy attorney, which further serves to suggest Spohn had a motive to conceal. Spohn's assertion that her plan would not have differed

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[27] *White*, 617 F3d at 478.

[28] *Id.* at 479 (citation and quotation marks omitted).

[29] See 11 USC 541(a).

[30] *Bauer v Commerce Union Bank*, 859 F2d 438, 441 (CA 6, 1988) (citation and quotation marks omitted).

regardless whether she disclosed her potential lawsuit is unavailing and evidences a misconception or misunderstanding of the applicable law. When viewed within the context of a motive to conceal, the issue is not whether the plan would ultimately have been any different but, rather, whether there is sufficient evidence to demonstrate that Spohn was trying to retain assets that rightfully belonged to the estate and that should have been within the control of the trustee.

In addition, Spohn alleges that because of her inability to maintain the scheduled payment plan, she presumed that her bankruptcy petition would be dismissed and, thus, any need for amendment of the petition was effectively rendered moot. We again find this argument unavailing. Although the bankruptcy petition was dismissed because of a failure to comply with the payment schedule, it cannot be determined whether the existence of the possible civil lawsuit would have altered the bankruptcy court's decision in this regard. Had the lawsuit been disclosed, the trustee could have elected to pursue the claim, on Spohn's behalf, with any recovery available to the estate for payment of creditors. The existence of the possible lawsuit might have resulted in an amendment of the Chapter 13 plan rather than its complete dismissal. Moreover, Spohn's contention that her failure to disclose the asset was simply her belief that anticipated dismissal of the petition rendered the necessity for disclosure moot, is more properly considered within the context of whether "the evidence indicates an absence of bad faith,"[31] rather than motive for concealment.

c. BAD FAITH

When considering whether "the evidence indicates an absence of bad faith," courts will look, in particular,

[31] *White*, 617 F3d at 478.

at the plaintiff's "attempts" to advise the bankruptcy court of the omitted claim.[32] More specifically, courts primarily examine a plaintiff's efforts to correct the bankruptcy schedules and to make the bankruptcy court aware of any initially undisclosed claims.[33] "Since the bankruptcy system depends on accurate and timely disclosures, the extent of these efforts, together with their effectiveness, is important."[34] In this case, there is no dispute that Spohn did not inform the bankruptcy court of the potential sexual harassment lawsuit or make any attempts to amend her bankruptcy petition. This supports that Spohn was acting in bad faith.

And Spohn's contention that her filing of the sexual harassment lawsuit before formal dismissal of the bankruptcy petition evidences her lack of bad faith is unavailing. On August 26, 2009, the bankruptcy trustee filed its motion to dismiss Spohn's Chapter 13 plan. Spohn then filed this litigation on September 28, 2009. On that same day, Spohn voluntarily withdrew her response to the bankruptcy trustee's motion to dismiss. Although Spohn's bankruptcy petition was not formally dismissed until March 11, 2010, her failure to disclose the sexual harassment lawsuit after the trustee had submitted a motion to dismiss further suggests Spohn's bad faith.

Similarly, Spohn's assertion that her failure to disclose the potential lawsuit was merely mistake or inadvertence because she was unaware of her duty to disclose cannot be supported. "[I]f [courts] were to equate lack of legal training regarding a statutory duty to disclose or absence of affirmative efforts to conceal the claim with excusable mistake or inadvertence, it

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[32] *Id.*

[33] *Id.* at 480.

[34] *Id.*

would undermine the familiar maxim that, even for *pro se* litigants, ignorance of the law is no excuse."[35] In addition:

> The Debtor signed her bankruptcy petition under penalty of perjury. By doing so, she certified that she had no claims against the Defendants. It was the Debtor's responsibility to verify the accuracy of the information contained in her schedules and statement of financial affairs and she "had the duty to carefully consider all of the questions posed and to see that they [were] completely and correctly answered."[36]

Thus, alleged lack of knowledge of the duty to disclose is not a defense to failing to fulfill that duty.

4. UNFAIR DISADVANTAGE OR DETRIMENT

Spohn contends there is an additional factor to be considered in the application of judicial estoppel. Citing *New Hampshire v Maine*,[37] Spohn points to the consideration in that case of a factor involving the existence of an "unfair advantage" or "unfair detriment." The Court in *New Hampshire* delineated the factors for application of judicial estoppel as follows:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the

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[35] *Riddle v Chase Home Fin*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 2, 2012 (Docket No. 09-11182), 2010 WL 3504020 at *6.

[36] *In re Johnson*, 345 BR 816, 825 (WD Mich, 2006) (citation omitted) (alteration in original).

[37] *New Hampshire v Maine*, 532 US 742; 121 S Ct 1808; 149 L Ed 2d 968 (2001).

> second court was misled. . . . *A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.*
>
> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.[38]

But this additional factor is not determinative here. The purpose of the doctrine of judicial estoppel, especially in the context of bankruptcy proceedings, is to protect the judicial process, not the parties.[39]

> The doctrine of judicial estoppel is driven by the important motive of promoting truthfulness and fair dealing in court proceedings. Judicial estoppel differs from such other forms of estoppel as promissory estoppel and equitable estoppel in that judicial estoppel focuses on the relationship between the litigant and the judicial system as a whole, rather than solely on the relationship between the parties. Of utmost importance in determining whether to apply the doctrine of judicial estoppel is whether the party seeking to assert an inconsistent position would derive an unfair advantage * * * if not estopped.[40]

Again, as stated, the disclosure obligations of debtors are considered to be essential to the bankruptcy process because the

> rationale for . . . decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system*

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[38] *Id.* at 750-751 (emphasis added) (citations and quotation marks omitted).

[39] *Id.* at 749-750.

[40] *Gaumond v Trinity Repertory Co*, 909 A2d 512, 519 (RI, 2006), citing *New Hampshire*, 532 US at 751 (citations and quotation marks omitted).

> *depends on full and honest disclosure by debtors of all of their assets*. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete*.[41]

Spohn received an unfair advantage over her creditors in the bankruptcy action by not disclosing the possible sexual harassment lawsuit.

5. CONCLUSION

In sum, we conclude that (1) by failing to disclose her sexual harassment claim, Spohn assumed a position that was contrary to the one that she had asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position by confirming Spohn's Chapter 13 plan, which did not refer to her potential sexual harassment lawsuit; and (3) Spohn's omission did not result from mistake or inadvertence. On this latter point, Spohn had knowledge of the factual basis of the undisclosed sexual harassment claim, yet she never attempted to advise the bankruptcy court of the existence of that claim, which indicates both concealment and bad faith. Moreover, Spohn received an unfair advantage over her creditors in the bankruptcy action by not disclosing the possible sexual harassment lawsuit. Accordingly, we hold that the trial court did not err by concluding that judicial estoppel barred Spohn's claim.

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[41] *Coastal Plains*, 179 F3d at 208 (citation and quotation marks omitted).

C. ALLEGEDLY IMPROPER FACT-FINDING

Spohn contends that the trial court engaged in improper fact-finding when it implied that Spohn had a motive to conceal her sexual harassment claims from the bankruptcy court and that the court's finding in that regard was speculative. Spohn further argues that the trial court ignored affidavits submitted contesting the grant of summary disposition, despite the failure of defendants to submit any evidence or documentation contradicting the content of the affidavits.

Spohn is correct in her assertion that a trial court is precluded from making findings of fact or resolving issues of credibility when deciding a summary disposition motion.[42] Spohn refers to the trial court's comments indicating that she had a motive to conceal her lawsuit from the bankruptcy court and implying her bad faith. Specifically, the colloquy in the trial court on the motion for summary disposition included the following comments in response to Spohn's counsel's argument that Spohn had no motive to conceal:

> *The Court*: She knew the ins and outs of bankruptcy. This was her fourth bankruptcy.
>
> [*Plaintiff's Counsel*]: Yes, it was.
>
> *The Court*: So she certainly should know, or you would think anybody with normal knowledge would know that if it's a potential asset down the road it's got to be disclosed.
>
> [*Plaintiff's Counsel*]: Well, I don't, there is no evidence that she knew she had a potential asset.
>
> When she, when she came to the conclusion the only time that she [sic], this court could look to that she conceivably came to a conclusion that she had the requisite facts to draw that conclusion, was when her attorney wrote a letter in May of 2009.

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[42] *Jackhill Oil Co v Powell Prod, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

> But in May of 2009 the Chapter 13 in her mind was already on its way to being dismissed.
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> Plus the Browning case indicates that there has to be some showing of a benefit to her or a detriment to the plaintiff [sic] in this matter.
>
> *The Court*: Potential benefit.
>
> [*Plaintiff's Counsel*]: What potential benefit is there to her in this case[?]
>
> *The Court*: Well, she has, let's say she has a wild card sitting under the blotter here. Maybe when all this goes, you know—
>
> I'm just speculating now.
>
> [*Plaintiff's Counsel*]: I understand.
>
> *The Court*: —sort of a—
>
> Arguably, you are talking about no motive, maybe it would be nice to have the wild card sitting under the blotter somewhere so when all this calms down, okay, now you go ahead with the lawsuit. Would that be a possibility?
>
> [*Plaintiff's Counsel*]: I suppose if she had [sic], was a person who was lying in wait, but that is not what happened in this case. There was no lying in wait.
>
> She didn't create—
>
> She didn't send a letter out, her attorney didn't send out a letter in May 2009 after everything was resolved. I supposed [sic], to your point, had she waited until everything was resolved and then done that, conceivably, but she didn't. In fact, the fact that she didn't—
>
> *The Court*: She didn't disclose it to her attorney.

In this case, the trial court's statements and inquiries merely consisted of a means to question and challenge Spohn's counsel's argument based, in part, on the facts before the trial court regarding Spohn's familiarity with bankruptcy proceedings and her duty or obligation to disclose the lawsuit as a possible asset. And even in the one instance that the trial court suggests that Spohn could

have received a "potential benefit" from the failure to disclose, the trial court acknowledged it was engaged in speculation and not fact-finding.

Further, in granting summary disposition, the trial court explained its ruling, stating:

> Yeah, she doesn't have to know all the facts, or even the legal basis, to list it on her assets. And she knew about it way back in 2008, 2007 when the actual alleged acts actually occurred in 2007, 2008. So she knew that she possibly had a cause of action at that time.
>
> * * *
>
> You know, you talk about she's got an obligation to disclose all those assets and potential assets to the bankruptcy court.
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> * * *
>
> And it's certainly contrary to her position here when she didn't disclose such. So I believe that judicial estoppel does apply here, and I'm going to grant the motion.

The trial court's ruling was not premised on its speculation or finding of fact regarding Spohn's motive to conceal or bad faith. Rather, when viewed in context, the trial court's ruling was a legal determination that Spohn's failure to disclose her potential claims in the bankruptcy court was consistent with the applicability of judicial estoppel. Therefore, the trial court did not violate the bar against fact-finding and credibility determinations by a trial court when ruling on summary disposition.

We affirm.

WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ., concurred.

PEOPLE v GLENN-POWERS

Docket No. 301914. Submitted January 10, 2012, at Lansing. Decided May 8, 2012, at 9:10 a.m.

While Lawrence Z. Glenn-Powers was on probation, his probation officer requested an arrest warrant for probation violations regarding his failure to notify the probation officer of a change of address, his commission of a crime (an assault), and his failure to comply with the requirement of probation that he participate in an adult education or general equivalency diploma program. The motion and affidavit section of the form entitled "Motion, Affidavit, and Bench Warrant" was signed by the probation officer, but was not subscribed and sworn under oath. The bench warrant portion was signed by a circuit court judge. When defendant next reported to the probation officer, the probation officer summoned a deputy sheriff to place defendant under arrest. The deputy sheriff placed defendant under arrest on the basis of the warrant and conducted a search of defendant that yielded 35 packets of heroin. Defendant was charged in the Washtenaw Circuit Court with possession of heroin. Defendant moved to suppress the evidence on the basis that the arrest warrant was defective because the affidavit supporting it was not made under oath or affirmation as required by the Fourth Amendment. The court, Melinda Morris, J., agreed with defendant, granted his motion, and dismissed the case without prejudice. The prosecution appealed.

The Court of Appeals *held*:

The trial court erred by granting defendant's motion to suppress the evidence.

1. MCL 764.15(1)(g) authorizes the arrest of a probationer without a warrant when the arresting officer has reasonable cause to believe that the probationer has committed a probation violation. There was probable cause to believe that defendant had committed a probation violation.

2. Because the probation officer had probable cause to believe that defendant had committed a probation violation, the warrant was not the only basis for his arrest and it is irrelevant that the arresting officer had a subjective belief that the warrant was

necessary. The objective truth is that the arresting officer had a legitimate basis to arrest defendant without a warrant. The arrest was valid.

3. Because defendant was alleged to have violated his probation by committing an assault, a misdemeanor punishable by up to 93 days' imprisonment, MCL 764.15(1)(d) provides that he could be arrested without a warrant.

4. The requirement of the Fourth Amendment that an arrest warrant be supported by an oath or affirmation does not apply to a warrant for the arrest of a probationer.

5. Even if MCR 6.445(A) creates a requirement that probation-violation proceedings must be commenced by either a summons or an arrest warrant and that the warrant must be sworn to, any violation of that requirement did not amount to a Fourth Amendment violation that rendered the arrest, and the subsequent search, constitutionally infirm.

Reversed and remanded.

1. ARREST — PROBATION — ARREST OF PROBATIONER WITHOUT WARRANT.

A probationer may be arrested without a warrant when a peace officer has reasonable cause to believe that the probationer has violated a condition of probation (MCL 764.15[1][g]).

2. ARREST — ARRESTING OFFICER'S STATE OF MIND — PROBABLE CAUSE.

An arresting officer's state of mind, except for the facts that he or she knows, is irrelevant to the existence of probable cause; the officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause; the fact that the officer does not have the state of mind that is hypothecated by the reasons that provide the legal justification for the officer's action does not invalidate the action as long as the circumstances, viewed objectively, justify the action; the Fourth Amendment creates an objective standard to determine whether an arrest was lawful, without regard to the arresting officer's subjective belief.

3. SENTENCES — PROBATION — SEARCHES AND SEIZURES OF PROBATIONERS.

Probation is a matter of legislative grace; a probationer has no vested right in the continuation of probation and the probation order remains revocable and amendable at all times; a sentence of supervised release involves the surrender of certain constitutional rights; a probationer has a diminished expectation of privacy and may be subjected to searches that might be unreasonable if conducted on members of the general public; the Fourth Amend-

ment does not require a warrant to search a probationer's home or to arrest the probationer, therefore, the Fourth Amendment's oath and affirmation requirement generally applicable to warrants does not apply to a warrant for the arrest of a probationer.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *David A. King*, Senior Assistant Prosecuting Attorney, for the people.

Lloyd E. Powell, Washtenaw County Public Defender, and *Stephen M. Adams*, Assistant Washtenaw County Public Defender, for defendant.

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

SAWYER, P.J. This case presents the question whether a probationer was lawfully arrested pursuant to a probation-violation warrant when the probation-violation warrant was not sworn under oath. We conclude that, because a warrant is not required under the Fourth Amendment to make an arrest for a probation violation, it is irrelevant whether the warrant was properly issued in determining whether there was a Fourth Amendment violation. Accordingly, we reverse and remand.

Defendant was on probation in an unrelated case in the Washtenaw Circuit Court. His probation officer, Thomas Mihalic, requested an arrest warrant for probation violations. Mihalic utilized a standard State Court Administrator's Office (SCAO) form entitled "Motion, Affidavit, and Bench Warrant." That form alleged three reasons to arrest defendant and revoke his probation: failure to notify the probation officer of a change of address, commission of a crime (assault), and failure to comply with the requirement that he partici-

pate in an adult education or general equivalency diploma (GED) program. The motion and affidavit section was signed by Mihalic, but it was not subscribed and sworn under oath. The bench warrant portion was signed by the circuit judge in this case.

A few days later, defendant reported to Mihalic at the Washtenaw County Courthouse. Washtenaw County Deputy Sheriff David Anderson was summoned to place defendant under arrest. Deputy Anderson testified that the arrest was based on the warrant that had been presented to him by Mihalic. A search subsequent to the arrest conducted by Deputy Anderson yielded 35 packets of heroin. Defendant was charged with possession of heroin.[1]

Defendant moved to suppress the evidence on the basis that the search followed an unlawful arrest. The trial court thereafter granted defendant's motion on the basis that the arrest warrant was defective because it was not supported by an affidavit made under oath or affirmation as required by the Fourth Amendment of the United States Constitution. The trial court also rejected the argument that the good-faith exception applied. The trial court dismissed the case without prejudice. The prosecution now appeals, and we reverse.

There are, in fact, a number of reasons why the arrest and subsequent search in this case was, in fact, lawful. For the reasons discussed below, we conclude that the trial court erred by granting defendant's motion to suppress.

We begin by noting that the trial court did not conclude, nor does defendant argue, that there is any defect in the search aside from the arrest issue. That

[1] MCL 333.7403(2)(a)(*v*).

is, the only claim that the search was improper is based on the argument that the arrest itself was improper because of the fact that the warrant was not supported by an oath or affirmation. If we determine that the arrest was proper, then it will automatically follow that the search was proper. Similarly, there was no determination by the trial court, nor does defendant argue, that there was, in fact, a lack of probable cause to support the issuance of an arrest warrant. Rather, the trial court's holding was based on a conclusion that the requirement of the Fourth Amendment that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation" was not complied with regarding the oath or affirmation and, therefore, the arrest warrant was defective and the arrest under the warrant was unlawful. Indeed, the trial court even noted in its opinion on the motion to suppress that in the separate probation-revocation proceedings, defendant had pleaded responsible to the probation violations. Accordingly, we will proceed with our analysis under the assumption that there was, in fact, probable cause to believe that defendant committed the alleged probation violations listed in the warrant.

The first reason why this was a valid arrest is that an arrest warrant was not, in fact, required in this case. MCL 764.15(1)(g) authorizes an arrest without a warrant whenever a "peace officer has reasonable cause to believe the person . . . has violated 1 or more conditions of a . . . probation order imposed by a court of this state . . . ." As noted above, there is no argument in this case that there was, in fact, probable cause to believe that defendant had committed a probation violation or that the arresting officer had probable cause to so believe.

Although defendant acknowledges in his brief that probation-violation proceedings can be commenced without the issuance of an arrest warrant, he attempts to argue that that is irrelevant because a warrant was nevertheless obtained and was invalid. Defendant supports this argument with the observation that the arresting officer stated that the warrant was the only basis for the arrest. But, as discussed already, the warrant was not the only basis for the arrest. And the fact that the arresting officer may have erroneously believed that it was is irrelevant.

In *Devenpeck v Alford*,[2] the United States Supreme Court addressed the issue whether an arresting officer must correctly identify the basis for an arrest in order for the arrest to be valid. In *Devenpeck*, the officer arrested the plaintiff for a violation of the Washington Privacy Act.[3] The charge was subsequently dismissed, and the plaintiff filed suit, arguing that he had been arrested without probable cause.[4] The United States Court of Appeals for the Ninth Circuit had ruled that the probable cause for the arrest must be related to the charge that the officer arrested the person for, or for a closely related offense.[5] The Supreme Court disagreed, concluding that what matters is whether objectively there exists probable cause to believe that a crime has occurred, not whether the officer subjectively identified the correct crime:

> Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. See *Whren* v. *United States*, 517 U.S. 806, 812-813, 135 L. Ed. 2d 89, 116 S. Ct. 1769

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[2] *Devenpeck v Alford*, 543 US 146; 125 S Ct 588; 160 L Ed 2d 537 (2004).

[3] Wash Rev Code 9.73.030.

[4] *Devenpeck*, 543 US at 151.

[5] *Id*. at 152.

> (1996) (reviewing cases); *Arkansas* v. *Sullivan*, 532 U.S. 769, 149 L. Ed. 2d 994, 121 S. Ct. 1876 (2001) *(per curiam)*. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, " 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' " *Whren*, *supra*, at 813, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (quoting *Scott* v. *United States*, 436 U.S. 128, 138, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978)). "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Whren*, *supra*, at 814, 135 L. Ed. 2d 89, 116 S. Ct. 1769. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton* v. *California*, 496 U.S. 128, 138, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990).[6]

While *Devenpeck* involved the question whether the arresting officer correctly identified the crime for which to book the suspect, and this case involves whether the arresting officer correctly identified the legal basis for the arrest, we do not believe that that supplies a meaningful difference. The Supreme Court clearly established that the Fourth Amendment creates an objective standard to determine whether an arrest was lawful, without regard to the arresting officer's subjective belief. And the objective truth in this case is that the arresting officer had a legitimate basis to arrest defendant without a warrant. Therefore, the arrest was valid without regard to the officer's subjective belief that he needed a warrant. In sum, the officer's erroneous belief that a warrant was necessary, as well as any

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[6] *Id*. at 153.

erroneous belief that the warrant was valid, is immaterial to the question whether the arrest was valid under the Fourth Amendment.

The next reason that this arrest was valid is similar to the first. One of the reasons for the probation violation was that defendant had committed an assault. An ordinary assault and battery[7] is a misdemeanor punishable by up to 93 days' imprisonment. And, as such, it too justifies an arrest without a warrant.[8]

Finally, the prosecution also argues that the principle discussed in *Triplett v Deputy Warden, Jackson Prison*,[9] that the probable cause and oath or affirmation requirements of the Fourth Amendment do not apply to parole-revocation warrants, should also apply to probation-violation warrants. Defendant counters that *Triplett* is inapplicable here because, unlike a probationer, a parolee is considered to still be in custody, not just in prison.[10] While the status of a probationer and a parolee are arguably different, that does not mean that the probationer necessarily enjoys the same Fourth Amendment protections as a member of the general public unencumbered by an order of probation.

In *Triplett*,[11] this Court addressed a prisoner's habeas corpus challenge. The prisoner argued, in relevant part, that his incarceration was unconstitutional because the warrant for his arrest for a parole violation was "not supported by a showing of probable cause or by oath or affirmation."[12] This Court, agreeing with federal au-

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[7] MCL 750.81.

[8] MCL 764.15(1)(d).

[9] *Triplett v Deputy Warden, Jackson Prison*, 142 Mich App 774, 781-783; 371 NW2d 862 (1985).

[10] See *id*. at 781.

[11] *Id*.

[12] *Id.*

thorities, determined that the oath or affirmation requirements of the United States Constitution and the Michigan Constitution did not apply to a warrant for the arrest of a parolee for a parole violation.[13] We find this analysis persuasive.

Probation is a matter of legislative grace. *People v Johnson*.[14] Because it is a matter of grace, a defendant has no vested right in its continuance and the probation order remains at all times revocable and amendable.[15] Similarly, a sentence of supervised release necessarily involves the surrender of certain constitutional rights. See *People v Harper*.[16] In addition, a probationer has a diminished expectation of privacy and, accordingly, may be subjected to searches that might be unreasonable if conducted on members of the general public. See *United States v Knights*.[17] In *Knights*, the Supreme Court of the United States explained that—at least with regard to searches—the "balance of governmental and private" interests warranted "a lesser than probable-cause standard" of protection under the Fourth Amendment; specifically, the Court held that a probationer has "significantly diminished privacy interests" so that an officer need only have a "reasonable suspicion" that the

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[13] *Id.* at 781-782 (agreeing that a revocation of parole does not constitute a seizure that invokes the oath or affirmation requirement and concluding on that basis that the prisoner's "reincarcerat[ion] pursuant to a parole-violation warrant that was not supported by oath or affirmation" was not illegal).

[14] *People v Johnson*, 210 Mich App 630, 634; 534 NW2d 255 (1995).

[15] *Id.*

[16] *People v Harper*, 479 Mich 599, 627; 739 NW2d 523 (2007) (noting that a probationer does not have the right to a jury trial at a revocation hearing and does not have the right to have the violation proved beyond a reasonable doubt).

[17] *United States v Knights*, 534 US 112; 122 S Ct 587; 151 L Ed 2d 497 (2001).

probationer is engaged in criminal activity before the officer could lawfully search the probationer.[18]

Moreover, the United States Supreme Court observed in *Griffin v Wisconsin*[19] that "[t]o a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.' *Morrissey* v. *Brewer*, 408 U.S. 471, 480 [92 S Ct 2593; 33 L Ed 2d 484] (1972)." In *Griffin*, the Court upheld a search of a probationer's home without a warrant under the state's probation regulations, as being reasonable under the Fourth Amendment.[20] In so concluding, the Court rejected the need for a warrant, concluding that, in the context of probation supervision, a "warrant requirement would interfere to an appreciable degree with the probation system . . . ."[21]

If the Fourth Amendment does not require a warrant to search a probationer's home, then it is not unreasonable to conclude that it does not require a warrant to arrest a probationer. Therefore, given a probationer's reduced privacy interests, we agree with the prosecution that the principle discussed in *Triplett* can be extended from parolees to probationers. As such, the oath or affirmation requirement generally applicable to warrants does not apply to a warrant for the arrest of a probationer.

Finally, even if we were to agree with defendant's argument that under MCR 6.445(A) a probation viola-

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[18] *Id.* at 121.

[19] *Griffin v Wisconsin*, 483 US 868, 874; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

[20] *Id*. at 880.

[21] *Id.* at 876.

tion proceeding must be commenced with either a summons or an arrest warrant and, if it is commenced with an arrest warrant, the warrant must be made under oath or affirmation, that does not support the conclusion that the arrest violated the Fourth Amendment. In *Virginia v Moore*,[22] the Supreme Court considered a case where the defendant was arrested for a misdemeanor under circumstances in which a state statute required the issuance of a summons rather than a custodial arrest. A subsequent search of the defendant yielded cocaine.[23] The Court concluded that, while states are free to impose additional restrictions on the arrest powers of the police, such restrictions do not alter the protections of the Fourth Amendment.[24] That is, a violation of the additional state restriction does not violate the Fourth Amendment and, therefore, does not render invalid the search subsequent to the arrest.[25] Therefore, even if we were to agree with defendant that the court rule creates a requirement that probation-violation proceedings must be commenced by either a summons or an arrest warrant, and that the warrant must be sworn to, a violation of such a requirement still would not amount to a Fourth Amendment violation that would render the arrest, and the subsequent search, constitutionally infirm.

For the above reasons, we conclude that it does not matter whether the arrest warrant in this case was unsworn because it was unnecessary for there to be a sworn arrest warrant. Defendant's arrest was lawful under the Fourth Amendment and, therefore, so was the subsequent search.

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[22] *Virginia v Moore*, 553 US 164, 167; 128 S Ct 1598; 170 L Ed 2d 559 (2008).

[23] *Id.*

[24] *Id.* at 176.

[25] *Id.* at 176-177.

In light of this conclusion, it is unnecessary to consider the prosecution's second argument, whether the exclusionary rule should be applied in this situation assuming that the arrest was, in fact, unlawful.

For the above reasons, we conclude that the trial court erred by granting defendant's motion to suppress the evidence.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

WHITBECK and M. J. KELLY, JJ., concurred with SAWYER, P.J.

PEOPLE v DILLON

Docket No. 303083. Submitted April 3, 2012, at Detroit. Decided May 15, 2012, at 9:00 a.m.

The 47th District Court, Marla E. Parker, J., bound Brendon M. Dillon over to the Oakland Circuit Court on a charge of possessing less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), on the basis of evidence discovered during a traffic stop initiated when a police officer saw an air freshener hanging from defendant's rearview mirror in a manner that appeared to be obstructing defendant's view in violation of MCL 257.709(1)(c). Defendant moved to dismiss the charge on the ground that the traffic stop was unconstitutional. The circuit court, Daniel P. O'Brien, J., granted the motion, ruling that MCL 257.709(1)(c) was void for vagueness. The prosecution appealed.

The Court of Appeals *held*:

1. The officer had reasonable suspicion to stop defendant's vehicle because the officer could see that the air freshener hanging from defendant's rearview mirror had the potential to obstruct defendant's view in violation of MCL 257.709(1)(c). Furthermore, after stopping defendant, the officer saw an object being thrown from the front passenger window, then found a syringe in the vicinity of the thrown object. The ongoing legality of a detention after the initial stop must be reasonable and depends on the evolving circumstances with which the officer is faced, and this observation justified the continuation of the detention.

2. A party asserting a facial challenge to the constitutionality of a statute must demonstrate that no circumstances exist under which the statute would be valid. A penal statute is unconstitutionally vague when not challenged on First Amendment grounds if, considered in light of the facts at issue, it fails to provide fair notice of the conduct proscribed or is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred. Fair or proper notice exists if the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. The statute cannot use terms that require a person of ordinary intelligence to speculate about their meaning and differ about their application.

For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.

3. The version of MCL 257.709 that defendant was charged with violating, as amended by 2000 PA 127, was not facially void for vagueness or unconstitutional as applied to defendant. The statutory prohibition of dangling or suspended objects that obstruct the driver's vision used commonly understood, definite terms that placed ordinary citizens on notice of the prohibited conduct. The circuit court erred by concluding that the statute was void for vagueness because it could have been violated by windshield glare or rearview mirrors, which are not dangling or suspended objects.

Reversed.

CONSTITUTIONAL LAW — STATUTES — VAGUENESS — DRIVING WITH OBJECTS OBSTRUCTING VISION.

MCL 257.709, as amended by 2000 PA 127, which prohibited a person from driving a motor vehicle with a dangling ornament or other suspended object that obstructed the vision of the driver of the vehicle except as authorized by law, was not unconstitutionally vague.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, and *Thomas R. Grden*, Chief, Appellate Division, for the people.

Linda M. Goetz for defendant.

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM. The district court bound defendant over to the circuit court on a charge of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), on the basis of evidence seized during a traffic stop conducted for a violation of MCL 257.709. The circuit court suppressed the evidence from the search, held MCL 257.709 void for vagueness, and dismissed the charges against defendant. The prosecution appeals by right. We reverse.

First, the prosecution argues that police officer Jeremy Beisel had reasonable suspicion to stop defendant because the air freshener hanging below the rearview mirror was potentially obstructing defendant's view, a violation of MCL 257.709(1)(c). We agree.

This Court will not reverse a trial court's findings regarding a motion to suppress evidence as illegally seized unless they are clearly erroneous. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court made a mistake. *Id*. We review de novo as a question of law whether a search was supported by the constitutional standard of reasonable suspicion. *People v Bloxson*, 205 Mich App 236, 245; 517 NW2d 563 (1994); see also *United States v Arvizu*, 534 US 266, 275; 122 S Ct 744; 151 L Ed 2d 740 (2002).

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). Generally, if evidence is unconstitutionally seized, it must be excluded from trial. *People v Goldston*, 470 Mich 523, 528; 682 NW2d 479 (2004); *Terry v Ohio*, 392 US 1, 12-13; 88 S Ct 1868; 20 L Ed 2d 889 (1968). But a police officer may stop and detain a motor vehicle on the basis of an articulable and reasonable suspicion that the vehicle or one of its occupants is violating the law, including a law regulating equipment. *People v Matthew Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). This Court's determination of whether there was reasonable suspicion to justify a stop must be made on a case-by-case basis, evaluated under the totality of the circumstances, and based on common sense. *People v Jenkins*, 472 Mich

26, 32; 691 NW2d 759 (2005). The subjective intent of the police officer is irrelevant to the validity of the stop. *People v John Williams*, 472 Mich 308, 314 n 7; 696 NW2d 636 (2005).

A court is required to suppress evidence otherwise lawfully seized during a traffic stop only if the officer did not have reasonable suspicion to justify the stop. See *People v Davis*, 250 Mich App 357, 363-364; 649 NW2d 94 (2002); *Williams*, 236 Mich App at 612. The statute that provided the basis for the traffic stop at issue, MCL 257.709(1), provided at the time:

> A person shall not drive a motor vehicle with any of the following:
>
> * * *
>
> (c) A dangling ornament or other suspended object that obstructs the vision of the driver of the vehicle, except as authorized by law.[1]

The facts and circumstances at issue provided Beisel the requisite articulable and reasonable suspicion to justify the stop. First, Beisel was able to see the air freshener from his patrol car while he was driving behind defendant. Second, the air freshener was hang-

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[1] The Legislature amended MCL 257.709 in 2010 PA 258, effective December 14, 2010, to provide in relevant part:

> (1) A person shall not *operate* a motor vehicle with any of the following:
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> * * *
>
> (c) *An* object that obstructs the vision of the driver of the vehicle, except as authorized by law. [Emphasis added.]

Although applying the amended version of the statute would not change our conclusion, we refer in this opinion to the statute in effect at the time of the traffic stop.

ing, at least two or three inches below the rearview mirror. Third, Beisel testified that from his perspective, the air freshener obstructed defendant's view. We conclude that the facts and circumstances known to Beisel provided reasonable suspicion that a traffic violation was occurring, which justified the traffic stop. *Davis*, 250 Mich App at 363; *Williams*, 236 Mich App at 612, 615.

Furthermore, after stopping defendant, Beisel observed an object being thrown out the front passenger window. Beisel saw a syringe in the vicinity of the thrown object. The ongoing legality of the detention after the initial stop must be reasonable and depends on "the evolving circumstances with which the officer is faced." *Williams*, 472 Mich at 315. In this case, the extension—or arguably the continuation—of the detention was justified on the basis of Beisel's observing the suspected drug paraphernalia.

Second, the prosecution argues that the version of MCL 257.709 that defendant was charged with violating was not facially void for vagueness or unconstitutional as applied. We agree.

This Court reviews de novo a void-for-vagueness challenge not involving First Amendment freedoms " 'in light of the facts of the case at hand.' " *People v Nichols*, 262 Mich App 408, 409-410; 686 NW2d 502 (2004) (citation omitted).

Statutes are presumed to be constitutional, and the party challenging the statute has the burden of showing the contrary. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). When a party asserts a facial challenge to the constitutionality of a statute, the party must demonstrate that no circumstances exist under which the statute would be valid. *Id.* at 160-161.

In *People v Hrlic*, 277 Mich App 260; 744 NW2d 221 (2007), this Court reviewed a constitutional vagueness challenge to MCL 257.648, which requires a driver to signal when "turning from a direct line." The Court, citing *Sands*, 261 Mich App at 161, and *People v Hill*, 269 Mich App 505, 524; 715 NW2d 301 (2006), stated the pertinent test to determine whether a penal statute is unconstitutionally vague when not challenged on First Amendment grounds: "A statute may be unconstitutionally vague . . . [if] it fails to provide fair notice of the conduct proscribed, or . . . it is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred." *Hrlic*, 277 Mich App at 263. Fair or proper notice exists if the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Id.* A court considers a vagueness challenge in light of the facts at issue. *Sands*, 261 Mich App at 161. The statute cannot use terms that require a person of ordinary intelligence to speculate about their meaning and differ about their application. *Id.* "For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id.*

The applicable version of the challenged statute, MCL 257.709, was not facially void for vagueness or unconstitutional as applied to defendant. The statute used commonly understood, definite terms that placed ordinary citizens on notice of the prohibited conduct and provided police officers sufficient guidance to apply the statute in a nonarbitrary and nondiscriminatory way. As used in the statute, "dangling ornament" and "suspended object" are commonly understood phrases. "Dangle" is defined as "to hang loosely, esp[ecially] with a swaying motion." *Random House Webster's College*

Dictionary (1997). "Suspend" is defined as "to hang by attachment to something above, esp[ecially] so as to allow free movement." *Id*. "Obstruct" is also a commonly understood term, meaning "to block or close up with an obstacle[.]" *Id*. These terms are definite and clear enough to permit a citizen of ordinary intelligence a reasonable opportunity to know what the Legislature intended to prohibit and also not so indefinite that unlimited discretion is conferred on police officers to determine whether an offense has occurred. *Hrlic*, 277 Mich App at 263.

The circuit court adopted the reasoning of defense counsel that a windshield glare or a rearview mirror could have violated the statute and, therefore, the statute was void for vagueness. Although there is a legitimate argument that a rearview mirror or windshield glare could obstruct a driver's view, the statute prohibited *dangling or suspended objects* that obstruct a driver's view. Windshield glare is not a dangling or suspended object. A rearview mirror is not commonly understood as a dangling or suspended object. The reference to an object that is dangling or suspended implies that the object is hanging or is allowed to move freely. Therefore, the statute was not void for vagueness.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

MARKEY, P.J., and MURRAY and SHAPIRO, JJ., concurred.

MITCHELL v MITCHELL

Docket No. 306559. Submitted March 6, 2012, at Grand Rapids. Decided March 13, 2012. Approved for publication May 15, 2012, at 9:05 a.m. Leave to appeal denied, 491 Mich 940.

John E. Mitchell obtained a divorce from Kate A. Mitchell on March 30, 2009, in the Newaygo Circuit Court, Family Division. The court, Graydon W. Dimkoff, J., initially granted the parties joint legal and physical custody of their two minor children, but six months later modified the parenting-time order to allow defendant to move with the children to Texas. In 2010, defendant moved to be released from a provision in the divorce judgment restricting overnight guests of the opposite sex in the children's presence. During the hearing, plaintiff accused defendant of allowing her boyfriend, Todd Smith, to spend the night while the children were present. The court ordered defendant to provide Smith's information to the Newaygo County Friend of the Court by a certain date so that a background check could be conducted. When defendant had not done so by the deadline, the court entered an order on February 15, 2011, requiring her to temporarily transfer custody of the children to plaintiff. Defendant appealed. Before the Court of Appeals issued its opinion, plaintiff moved to modify the custody arrangement to give him physical custody during the school year and defendant physical custody during the summers. After a two-day evidentiary hearing, the trial court orally granted the motion on August 26, 2011. On September 15, 2011, in an unpublished opinion per curiam (Docket No. 303257), the Court of Appeals vacated the February 15, 2011, order and remanded for further proceedings consistent with the Child Custody Act, MCL 722.21 *et seq*. After a hearing on October 3, 2011, the trial court determined that the two-day hearing it had held in August fully complied with the Court of Appeals' remand order. Consequently, the trial court entered an order changing physical custody of the children exclusively to plaintiff and suspending defendant's parenting time. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by failing to hold a separate hearing to establish proper cause or a change of circumstances

before the hearing to modify custody. While the first step toward modifying a custody award is to show proper cause or a change of circumstances, this determination does not necessarily require an evidentiary hearing. To establish proper cause, the moving party must establish by a preponderance of the evidence an appropriate ground that would justify the trial court's taking action. Appropriate grounds should include at least one of the 12 statutory best-interest factors and must concern matters that have or could have a significant effect on the child's life. Only after a moving party has established proper cause or a change of circumstances may the trial court reevaluate the statutory best-interest factors. In this case, the trial court expressly stated its reasons for finding that the proper-cause standard had been satisfied before proceeding with its custody-modification analysis, and it was not required to have conducted a separate hearing before revisiting its custody decision. The Court of Appeals' previous decision did not limit the trial court's consideration of any facts or circumstances; rather, it stated that the trial court had erred by not following the procedure outlined in MCL 722.27(1) and by improperly using custody as a means to punish defendant for refusing to obey the court's orders. The trial court's determination that proper cause or a change of circumstances existed to justify considering whether modification of its prior order would be in the children's best interests was not against the great weight of the evidence.

2. The trial court did not commit clear legal error on a major issue or abuse its discretion in modifying the custody order. In considering a motion to modify a custody order, if the trial court determines that an established custodial environment exists, the moving party has the burden of proving by clear and convincing evidence that the proposed modification is in the best interests of the children. To determine whether the moving party has satisfied this burden, the trial court must consider all the best-interest factors set forth in MCL 722.23. Because an established custodial relationship existed with both parents in this case, plaintiff had the burden of proving by clear and convincing evidence that modification of the existing custody order was in the best interests of the children. The trial court detailed on the record the evidence it considered for each of the best-interest factors and which parent the trial court found to be better suited in regard to each factor. The court also interviewed the children and determined that the youngest child was not old enough to express a preference regarding custody and that defendant and Smith's attempted bribery, encouragement, and possible threats undermined the children's credibility in this regard. These findings were not against the great weight of the evidence.

3. The trial court did not abuse its discretion by limiting defendant's parenting time because of concerns about her behavior and because of her failure to provide Smith's personal information for a background check. Although the Court of Appeals determined that the trial court had failed to follow the proper steps before modifying the custody arrangement, it specifically did not decide the legality of the trial court's underlying order for Smith to provide his identifying information to the Friend of the Court. The trial court expressed concern that defendant was bitter, vengeful, and vindictive; that she would continue making unfounded accusations against plaintiff; that she was bribing and threatening the children; and that Smith appeared to be a part of this behavior. The court's determination that it was in the best interests of the children for Smith not to have contact with the children until a background check was completed was based on detailed and explicit findings.

4. Defendant's argument that the trial judge should be disqualified from hearing further matters on this case because he showed indignation toward defendant and the Court of Appeals previous rulings was undeveloped and unsupported by the record.

Affirmed.

PARENT AND CHILD — CHILD CUSTODY — MODIFICATION OF CHILD-CUSTODY ORDERS — PROPER CAUSE OR CHANGE OF CIRCUMSTANCES — EVIDENTIARY HEARINGS.

The first step toward modifying a custody award is to show proper cause or a change of circumstances; to establish proper cause, the moving party must establish by a preponderance of the evidence an appropriate ground that would justify the trial court's taking action; appropriate grounds should include at least one of the 12 best-interest factors set forth in MCL 722.23 and must concern matters that have or could have a significant effect on the child's life; only after a moving party has established proper cause or a change of circumstances may the trial court reevaluate the statutory best-interest factors; the determination that proper cause or a change of circumstances exists does not necessarily require an evidentiary hearing (MCL 722.27[1][c]).

Greer & Dykman, P.C. (by *John M. Greer* and *Melissa K. Dykman*), for John E. Mitchell.

Kate A. Mitchell *in propria persona*.

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM. Defendant appeals by right the trial court's October 3, 2011, order granting a modification of the parties' divorce judgment with respect to child custody. We affirm.

The parties were married in 1991, had one child in 2003 and one in 2006, and were divorced on March 30, 2009. The parties were awarded joint physical and legal custody of the children. Six months after the divorce judgment, defendant moved to Texas with the children. Defendant began dating Todd Smith while in Texas, and plaintiff requested that Smith submit to a background check because plaintiff was concerned for the safety of his children. The trial court ordered defendant to provide information to plaintiff, but defendant and Smith refused.

At a hearing on December 29, 2010, the trial court ordered defendant to provide Smith's information to the Friend of the Court, reasoning that a background check was necessary to ensure the children's safety. Defendant and Smith continued to resist. Later, on February 15, 2011, the trial court entered an order temporarily transferring physical custody to plaintiff. Defendant appealed, and this Court vacated the trial court's order and remanded the matter for continued proceedings consistent with the Child Custody Act. *Mitchell v Mitchell*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2011 (Docket No. 303257) (*Mitchell I*).

Before this Court released its opinion in *Mitchell I*, plaintiff moved to modify the custody arrangement so that he would have physical custody during the school year and defendant would have physical custody during the summers. The trial court issued an oral opinion after a two-day evidentiary hearing.

By the time this Court issued *Mitchell I*, the trial court had already held the two-day evidentiary hearing on plaintiff's motion for modification of custody. At a hearing on defendant's objections to the entry of a proposed order, the trial court determined that its two-day evidentiary hearing fully complied with this Court's remand order in *Mitchell I*. Consequently, the trial court entered its order to modify custody, which defendant now appeals.

Defendant first argues that the trial court did not establish proper cause or a change of circumstances in a separate proceeding before the hearing to modify custody. We disagree.

All custody orders must be affirmed on appeal unless the trial court committed a palpable abuse of discretion, made findings against the great weight of the evidence, or made a clear legal error. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The first step toward modifying a custody award is to show proper cause or a change of circumstances. MCL 722.27(1)(c); *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009). But the determination of whether proper cause or a change of circumstances exists does not necessarily require an evidentiary hearing. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

To establish proper cause, the moving party must establish by a preponderance of the evidence an appropriate ground that would justify the trial court's taking action. *Vodvarka v Grasmeyer*, 259 Mich App 499, 511-512; 675 NW2d 847 (2003). Appropriate grounds should include at least one of the 12 statutory best-interest factors and must concern matters that have or could have a significant effect on the child's life. *Id.* Only after a moving party has established proper cause

or a change of circumstances may the trial court re-evaluate the statutory best-interest factors. *Id.*

In this case, the trial court expressly stated on the record its reasons for finding that the proper cause standard had been satisfied. Defendant argues that this determination should have been made before the hearing to modify custody and relies on this Court's opinion in *Mitchell I*. Defendant mischaracterizes this Court's opinion, which provides: "Before modifying or amending an existing custody order, however, the circuit court must determine whether there has been a change in circumstances or if proper cause exists to revisit the custody decision." *Mitchell I*, unpub op at 2. This Court did not hold that a separate hearing had to be conducted before a custody decision may be revisited, nor is one necessarily required. *Vodvarka*, 259 Mich App at 512. The trial court is merely required to preliminarily determine whether proper cause or a change of circumstances exists before reviewing the statutory best-interest factors with an eye to possibly modifying a prior custody order. *Id.*; MCL 722.27(1)(c).

In this case, the trial court clearly stated on the record its determination that proper cause had been established before proceeding with its custody analysis of the statutory best-interest factors. Specifically, the trial court found defendant at fault for failing to facilitate plaintiff's communication with the children by Skype, as the court had previously ordered. The trial court also found that defendant had failed to pay her court-ordered share of parenting-time travel expenses and failed to sign a release for the children's school records, again as required by previous court order. The trial court found that defendant and Smith had continued to refuse to disclose information on Smith for a background check. Finally, the trial court found that

allegations of plaintiff touching his daughter inappropriately were unfounded and that it was likely defendant had fabricated the allegations. And the trial court's determination of proper cause was related to the statutory best-interest factors and constituted facts that have or could have a significant effect on the children's lives. *Vodvarka*, 259 Mich App at 512.

Defendant also argues that the trial court's bases for determining proper cause were the exact factors this Court in *Mitchell I* said could not be considered. Again, defendant mischaracterizes this Court's opinion. In *Mitchell I* this Court said that the trial court had erred by not following the procedure outlined in MCL 722.27(1), i.e., by not considering the statutory best-interest factors of MCL 722.23 and by improperly using custody as a means to punish defendant for refusing to obey the court's orders. *Mitchell I*, unpub op at 3. This Court remanded to the trial court to conduct proceedings consistent with the Child Custody Act. *Id*. This Court did not state that the trial court could not consider certain facts or circumstances in proper proceedings. The trial court's determination that proper cause or a change of circumstances existed to justify considering whether modification of its prior order would be in the children's best interests was not against the great weight of the evidence. *Pierron*, 486 Mich at 85.

Next, defendant argues that the trial court erred by modifying custody because the trial court's decision was against the great weight of the evidence. We disagree.

This Court reviews the trial court's findings of fact under the great weight of the evidence standard. MCL 722.28. Under this standard the trial court's determination will be affirmed unless the evidence clearly preponderates in the other direction. *Pierron*, 486 Mich

at 85. Before modifying a custody award the trial court must determine whether there is proper cause or a change in circumstances justifying a modification in the child's best interests. *Vodvarka*, 259 Mich App at 511-512.

Once the trial court determines there is proper cause or a change of circumstances to permit the matter to be revisited, the trial court still may not modify custody from an established custodial environment unless there is clear and convincing evidence that a modification is in the best interest of the child. MCL 722.27(1)(c). Thus, if the trial court determines that an established custodial environment exists, the moving party has the burden of proving by clear and convincing evidence that the proposed modification is in the best interests of the children. *Parent*, 282 Mich App at 154. In determining whether the moving party has satisfied this burden, the trial court must consider all the statutory best-interest factors set out in MCL 722.23. *Pierron*, 486 Mich at 92-93; *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). In this case, the trial court determined that an established custodial relationship existed with both parents. So, plaintiff had the burden of proving by clear and convincing evidence that modification of the existing custody order was in the best interests of the children. *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008).

The trial court specified on the record the evidence it considered for each of the statutory best-interest factors and which parent the trial court found to be better suited in regard to each factor. The trial court also interviewed the children to determine their preference; however, the trial court indicated that the youngest child was not old enough to express a preference. The trial court further stated that it was not going to

consider the children's purported desire to live in Texas because the court found that defendant and Smith's attempted bribery, encouragement, and possible threats undermined the children's credibility.

Defendant on appeal sets out many specific instances of what she does for the children and argues that she is the better parent. But defendant fails to acknowledge any of the testimony from plaintiff and makes assertions not supported by evidence in the record. The trial court considered everything defendant does for the children and commended her on her efforts; however, the trial court determined that, overall, a modification in custody was in the best interests of the children. After thoroughly reviewing the evidence presented and the trial court's findings, we conclude that the court's findings of fact were not against the great weight of the evidence. We also conclude that the court did not commit clear legal error on a major issue or abuse its discretion. MCL 722.28; *Pierron*, 486 Mich at 85.

Defendant also argues that the trial court erred in limiting her parenting time because she had not provided Smith's personal information. Defendant argues that because obtaining Smith's personal information is not relevant to the best interests of the children, the conditions placed on defendant's visitation with the children should be struck. We disagree.

Because this issue was not raised before the trial court, it is unpreserved. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Nonetheless, this Court can overlook the preservation issue when "failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Const, Inc*, 269 Mich

App 424, 427; 711 NW2d 421 (2006). In this case, because the issue deals with child custody and parenting time for defendant, failure to consider it could result in manifest injustice, so this Court will overlook the issue of preservation.

This Court reviews discretionary rulings, including a trial court's custody and parenting-time decisions, for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). An abuse of discretion with regard to a custody issue occurs "when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*.

The trial court determined that modifying the custody award was in the best interests of the children and awarded plaintiff physical custody during the school year. The trial court also determined that defendant's parenting time in Texas would be suspended until Smith disclosed his information for a background check. The trial court also expressed concern that defendant was "bitter, and vengeful, and vindictive" and that defendant would continue to make up unfounded allegations about plaintiff.

Defendant argues that the trial court's decision to place conditions on her parenting time because of Smith's refusal to submit to a background check was inappropriate. Defendant argues that this Court in *Mitchell I* held that defendant's failure to provide Smith's background information could not be considered. Defendant again mischaracterizes this Court's opinion. Although this Court determined that the trial court had failed to follow the proper steps before modifying the custody arrangement, it specifically did not make any decision regarding the legality of the

court's underlying order for Smith to provide his identifying information to the Friend of the Court. *Mitchell I*, unpub op at 3. The trial court found reasons for concern in how defendant was acting and her accusations against plaintiff. In addition, the trial court was concerned that defendant was bribing and threatening the children. The trial court was also concerned that Smith appeared to be a factor in the behavior defendant was engaging in and determined that in the best interests of the children, Smith would not have contact with the children until a background check was completed. The trial court was very detailed and explicit in its findings regarding the children and their best interests. Our review of the record persuades us that the trial court did not abuse its discretion by placing limitations on defendant's parenting time on the basis of defendant's behavior and Smith's refusal to submit to a background check.

Lastly, defendant argues that the trial judge should be disqualified from hearing further matters on this case because he showed indignation toward defendant and this Court's rulings. We disagree.

This Court reviews a trial court's factual findings on a motion to disqualify for an abuse of discretion and reviews de novo the trial court's application of the facts to the law. *Olson v Olson*, 256 Mich App 619, 638; 671 NW2d 64 (2003). The trial court abuses its discretion when the trial court's decision falls outside the range of reasonable outcomes. *In re MKK*, 286 Mich App 546, 564; 781 NW2d 132 (2009). Due process requires that an unbiased and impartial decision-maker hear and decide a case. *Olson*, 256 Mich App at 642. A trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption. *In re MKK*, 286 Mich App at 566.

Defendant argues that the trial judge should be disqualified because of his alleged indignation. Defendant does not develop her argument and does not cite where in the record the trial judge's indignation appears. Indeed, we do not know to what she refers, but she insists that the trial court has refused to follow this Court's ruling in *Mitchell I*. Defendant continues to mischaracterize this Court's opinion. In *Mitchell I*, this Court remanded the case for proceedings consistent with the Child Custody Act. *Mitchell I*, unpub op at 3. Contrary to defendant's argument, the trial court complied with this Court's opinion. The trial court held a two-day evidentiary hearing and, on the basis of that evidence, made necessary findings justifying its order to modify the prior custody order.

Defendant has not indicated any other basis to find that the trial judge is biased or otherwise partial. A party cannot simply assert an error or announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Defendant has failed to carry her burden of demonstrating that the trial judge should be disqualified here.

We affirm.

METER, P.J., and FITZGERALD and MARKEY, JJ., concurred.

CLOHSET v NO NAME CORPORATION

Docket No. 301681. Submitted May 4, 2012, at Detroit. Decided May 15, 2012, at 9:10 a.m. Leave to appeal sought.

Clarence and Virginia Clohset and No Name Corporation entered into a lease agreement for commercial premises in 1991. Geraldine and Walter Goodman obligated themselves as guarantors for No Name. No Name failed to make lease payments, and the Clohsets filed a demand for possession on No Name in the 48th District Court on October 6, 1998. On October 21, 1998, the Clohsets filed in the district court a complaint against No Name for nonpayment of rent, seeking possession of the premises and costs, but not seeking money damages, which the complaint acknowledged would exceed the district court's general statutory jurisdictional limit of $25,000. The complaint noted that money damages would be sought in a separate action in the circuit court. On November 11, 1998, the Clohsets entered into a settlement agreement with No Name and the Goodmans, stating, in part, that No Name owed the Clohsets more than $384,000, plus interest. The settlement agreement required the parties to execute consent judgments for entry, potentially, in the district court and/or the circuit court. The consent judgments were to be held by the Clohsets and one or both were to be filed in the event that No Name or the Goodmans defaulted on the settlement agreement. Upon their filing, the consent judgments would add the Goodmans as named defendants and obligate the defendants as set forth therein. The Clohsets filed the district court consent judgment and an affidavit from their attorney stating that defendants had defaulted and owed the Clohsets more than $222,000, plus additional amounts, including costs and attorney fees as outlined in the settlement agreement. The district court, Edward Avadenka, J., entered the stipulated consent judgment on October 1, 1999. On March 24, 2009, after the Clohsets and Walter Goodman had died, Phillip M. Clohset, as personal representative of the estates of Clarence and Virginia Clohset, sent Geraldine Goodman a demand letter for more than $222,000. Defendants No Name, Geraldine Goodman, and the estate of Walter Goodman, deceased, stipulated the renewal of the consent judgment, and the district court, Marc Barron, J., entered the stipulated renewal on September 15, 2009. On October 14, 2009, defendants moved to vacate the October 1, 1999, consent judgment,

alleging that the district court had lacked subject-matter jurisdiction to enter it. Plaintiff responded with a motion to transfer the matter to the Oakland Circuit Court. The district court, Marc Barron, J., denied defendant's motion to vacate the judgment and granted plaintiff's motion to transfer pursuant to MCR 2.227(A)(1), which authorizes a transfer when the transferring court determines that it lacks jurisdiction of the subject matter of the action. Plaintiff then moved for entry of the consent judgment, previously entered in the district court, in the circuit court. The circuit court, Mark A. Goldsmith, J., denied plaintiff's motion and granted defendants' countermotion to dismiss without prejudice, holding that the judgment was void for lack of subject-matter jurisdiction in the district court. After filing an amended complaint in the circuit court, asserting breach of the parties' various agreements and related equitable claims, plaintiff moved for summary disposition on his breach claims. Defendants countered with a motion for summary disposition regarding all the claims. The circuit court, Phyllis C. McMillen, J., denied plaintiff's motion, granted defendants' motion, and dismissed the matter without prejudice. Plaintiff appealed.

The Court of Appeals *held*:

1. Michigan district courts have exclusive jurisdiction, under MCL 600.8301(1), over civil matters where the amount in controversy does not exceed $25,000 and, pursuant to MCL 600.8302(1) and (3), equitable jurisdiction and authority concurrent with that of the circuit court with respect to equitable claims arising under chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq*., which concerns summary proceedings to recover possession of premises. Because the grant of jurisdictional authority in MCL 600.8302(1) and (3) is a more specific grant than the general grant of jurisdictional power found in MCL 600.8301(1), when, as in this case, a district court's actions flow from its power arising under chapter 57 of the RJA, its actions are within the scope of MCL 600.8302(1) and (3), and MCL 600.8301(1) is inapplicable. The district court had jurisdiction over this case and erred by transferring it to the circuit court. Having properly acquired jurisdiction, the district court was obliged to render a final decision on the merits. The district court's specific jurisdiction over this case extended to the entry of the stipulated consent judgment, even though the consent judgment included an agreed-upon monetary component that, if it had been premised on the district court's general jurisdiction, would have exceeded the otherwise applicable statutory jurisdictional limit.

2. Defendants were not entitled to attack collaterally during the 2009 proceedings the consent judgment entered by the district

court on October 1, 1999. Their only option was to challenge the judgment on direct appeal or by a proper motion to alter or amend the judgment. Defendants took no action to challenge the judgment within a reasonable time, as allowed by MCR 2.612(C)(2). Plaintiff was entitled to enforce the judgment against defendants. The fact that the Clohsets' complaint did not seek money damages, and the fact that the stipulated money damages exceeded the general jurisdictional amount otherwise applicable in the district court, did not preclude enforcement of the consent judgment.

3. Even if the consent judgment was premised on an error in the exercise of the district court's jurisdiction, the error was of the parties' own making. Defendants cannot complain about an error created when they stipulated the entry of the consent judgment.

4. Because the district court had jurisdiction and improperly transferred the case to the circuit court, the circuit court had no jurisdiction to rule on plaintiff's motion to enter the consent judgment, on defendants' motion to dismiss, or on the parties' cross-motions for summary disposition, and should have transferred the case back to the district court. The judgment of the circuit court was vacated and the case remanded to the district court for the reinstatement and enforcement of the consent judgment entered on October 1, 1999.

Vacated and remanded.

1. COURTS — DISTRICT COURTS — EQUITABLE POWERS — JURISDICTION.

District courts in Michigan have exclusive jurisdiction, under MCL 600.8301(1), over civil matters where the amount in controversy does not exceed $25,000 and equitable jurisdiction and authority, under MCL 600.8302(1) and (3), concurrent with that of the circuit court with respect to claims arising under chapter 57 of the Revised Judicature Act, MCL 600.5701 *et seq*., which concerns summary proceedings to recover possession of premises; the grant of power in MCL 600.8302(1) and (3) is a more specific grant of jurisdictional authority than the general grant of jurisdictional authority in MCL 600.8301(1) and takes precedence over the general grant of jurisdictional authority; when a district court's actions flow from its power arising under chapter 57 of the RJA, its actions are within the scope of MCL 600.8302(1) and (3), and MCL 600.8301(1) is inapplicable.

2. COURTS — SUBJECT-MATTER JURISDICTION.

Subject-matter jurisdiction is established by the pleadings and exists when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous.

3. COURTS — JURISDICTION — AUTHORITY — JUDGMENTS.

Once a court of competent jurisdiction has become possessed of a case, its authority continues subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of coordinate authority may interfere with its action; a matter is finally and completely resolved when a judgment is entered; a "judgment" is the final consideration and determination of a court of competent jurisdiction on the matters submitted to the court.

4. COURTS — SUBJECT-MATTER JURISDICTION — JUDGMENTS — APPEAL — COLLATERAL ATTACKS.

Once a court's jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, will not render the court's judgment void, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked; lack of subject-matter jurisdiction may be collaterally attacked, whereas the exercise of subject-matter jurisdiction can be challenged only on direct appeal.

5. JUDGMENTS — CONSENT JUDGMENTS.

When a party approves an order or consents to a judgment by stipulation, the resultant judgment or order is binding on the parties and the court; absent fraud, mistake, or unconscionable advantage, a consent judgment cannot be set aside or modified without the consent of the parties, nor is it subject to appeal.

Butzel Long (by *Robert H. Schwartz, Michael J. Lavoie, David J. DeVine, Joseph E. Richotte*, and *Mary M. Mullin*) for plaintiff.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Kerry K. Cahill*) for defendants.

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

BOONSTRA, J. Plaintiff, Phillip M. Clohset, appeals as of right a circuit court order denying his motion for summary disposition and granting summary disposi-

tion in favor of defendants, No Name Corporation (No Name), Geraldine K. Goodman, and the estate of Walter A. Goodman, deceased, entered on November 30, 2010. We vacate the judgment of the circuit court and remand to the district court for reinstatement and enforcement of the stipulated consent judgment entered on October 1, 1999.

The facts of this case are not in dispute. But the case presents an unusual procedural history that requires us to consider issues of (a) subject-matter jurisdiction and (b) the validity, or degree of validity, of a stipulated consent judgment entered by the district court in an amount in excess of its jurisdictional limit.

Under the unusual circumstances outlined herein, we conclude that the district court had subject-matter jurisdiction over this case and that its entry of a stipulated consent judgment was proper, without regard to the jurisdictional amount-in-controversy limit that applies under the district court's general jurisdictional authority. Moreover, having neither appealed nor properly moved to alter or amend the stipulated consent judgment, defendants could not collaterally attack it, under the circumstances presented, 10 years later. Our conclusion derives in part from the well-established maxim that a party may not properly create error in a lower court and then claim on appeal that the error requires reversal. See, e.g., *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989) ("A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper [in the trial court] since to do so would permit the party to harbor error as an appellate parachute.").

We find that the district court erred by transferring this case to the circuit court. Further, given the jurisdiction of the district court, we find that the circuit

court erred by ruling on the merits of the case, by dismissing plaintiff's claims, and by granting summary disposition to defendants on plaintiff's claims.

I. FACTUAL AND PROCEDURAL HISTORY

This action was originally brought by Clarence and Virginia Clohset (the Clohsets). The Clohsets have since passed away and plaintiff, Phillip Clohset, has taken over as personal representative of their estates. The Clohsets and defendant No Name entered into a lease agreement for commercial premises in 1991, to which defendants Geraldine Goodman and Walter Goodman obligated themselves as guarantors for No Name. Defendant No Name subsequently failed to make its lease payments. The Clohsets filed a demand for possession on No Name in the district court on October 6, 1998, demanding possession of the premises. On October 21, 1998, they filed a complaint against No Name for nonpayment of rent, seeking possession of the premises and costs, but not seeking money damages, which the complaint acknowledged would exceed the district court's general statutory jurisdictional limit of $25,000. MCL 600.8301(1). The complaint noted that money damages would be sought in a separate action in the circuit court.

On November 11, 1998, the Clohsets entered into a settlement agreement with No Name, Geraldine Goodman, and Walter Goodman, stating, in part, that No Name owed the Clohsets $384,822.95, plus 9.5 percent interest. The settlement agreement further required the parties to execute "pocket" consent judgments for entry, potentially, in the district court and/or the circuit court. The consent judgments were to be held by the Clohsets, and one or both were to be filed in the event that No Name or the Goodmans defaulted on the

settlement agreement. Upon their filing, the consent judgments would add Geraldine Goodman and Walter Goodman as named defendants, and would obligate all defendants as set forth therein. Subsequently, the Clohsets filed the district court consent judgment, along with an affidavit from their attorney at the time, stating that defendants had defaulted and owed the Clohsets a net amount of $222,102.09, plus additional amounts, including costs and attorney fees, as outlined in the settlement agreement. The district court entered the stipulated consent judgment on October 1, 1999.[1]

Over nine years passed, during which time plaintiffs Clarence and Virginia Clohset and defendant Walter Goodman passed away, and then on March 24, 2009, plaintiff sent defendant Geraldine Goodman a demand letter for $222,102.09. Defendants stipulated with regard to a renewal of the consent judgment and the district court entered the stipulated renewal of the consent judgment on September 15, 2009. On October 14, 2009, defendants moved to vacate the original, October 1, 1999, consent judgment on the ground that the district court had lacked subject-matter jurisdiction to enter it. Plaintiff responded by moving to transfer the proceedings to the circuit court. The district court denied defendants' motion to vacate the judgment, granted plaintiff's motion to transfer (while striking proposed language that would have found a lack of subject-matter jurisdiction), and transferred the case to the circuit court pursuant to MCR 2.227(A)(1) (which authorizes a transfer only when the transferring court "determines that it lacks jurisdiction of the subject matter of the action").

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[1] On October 12, 1999, and February 23, 2000, the parties entered into an Amendment and a Second Amendment of the settlement agreement, respectively, and thereby reaffirmed their assent to the terms of the settlement agreement, including, but not limited to, the entry of the consent judgments.

Plaintiff then moved for entry of the consent judgment (previously entered in the district court) in the circuit court. The circuit court denied that motion, holding that the judgment was void for lack of subject-matter jurisdiction in the district court, dismissed the case without prejudice, and permitted plaintiff to file an amended complaint. After filing an amended complaint asserting breach of the parties' various agreements and related equitable claims, plaintiff moved for summary disposition on his breach claims only, and defendants countered with a motion for summary disposition on all of plaintiff's claims, both contract-based and equitable. The circuit court granted summary disposition in favor of defendants and dismissed plaintiff's claims.

Plaintiff claims on appeal that the circuit court erred by denying his motion to enter the consent judgment in the circuit court, by dismissing his initial claims, and by later denying summary disposition to plaintiff and granting summary disposition to defendants.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision whether to enter a consent judgment for an abuse of discretion. Cf. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 763; 630 NW2d 646 (2001) ("This Court reviews for abuse of discretion a trial court's decision on a motion to set aside a consent judgment."). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010), citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), clarification den 469 Mich 1224 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

The motion should be granted only when the plaintiff's claims are " 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id.* (citation omitted). Likewise, a motion made under MCR 2.116(C)(9) tests the legal sufficiency of a defense. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582; 794 NW2d 76 (2010). The motion should be granted only when " ' "the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." ' " *Price v High Pointe Oil Co, Inc*, 294 Mich App 42, 50; 817 NW2d 583 (2011), lv gtd 491 Mich 870 (2012), quoting *USA Cash #1, Inc v Saginaw*, 285 Mich App 262, 265-266; 776 NW2d 346 (2009), quoting *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002). We review de novo a trial court's grant of summary disposition on the basis of legally insufficient pleadings. *Maiden*, 461 Mich at 118. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). When deciding a motion for summary disposition under this subrule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). We review de novo a trial court's decision on a motion under this subrule. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The underlying question of whether a court had subject-matter jurisdiction is a question of law that this Court reviews de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 294 Mich App 310, 320; 812 NW2d 771 (2011).

III. ANALYSIS

Although plaintiff does not argue that the district court had subject-matter jurisdiction to enter the consent judgment, and does not challenge defendants' right to have collaterally attacked the judgment 10 years later or the circuit court's holding that the judgment was void *ab initio*, a discussion of these issues is necessary before proceeding with the parties' arguments on appeal. This Court generally does not address issues not raised by the parties on appeal. See *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 4 n 3; 704 NW2d 69 (2005). However, "[a]ll courts 'must upon challenge, or even sua sponte, confirm that subject-matter jurisdiction exists . . . .' " *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 479 n 2; 795 NW2d 797 (2010) (YOUNG, J., dissenting), quoting *Reed v Yackell*, 473 Mich 520, 540; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.). Further, this Court is empowered to "enter any judgment or order or grant further or different relief as the case may require . . . ." MCR 7.216(A)(7).

A. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION AND ERRED BY TRANSFERRING THE CASE TO THE CIRCUIT COURT

District courts in Michigan have exclusive jurisdiction over civil matters where the amount in controversy does not exceed $25,000. MCL 600.8301(1). In addition, district courts have "equitable jurisdiction and authority concurrent with that of the circuit court" with respect to equitable claims arising under chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq*. MCL 600.8302(1) and (3).

This Court previously has held that MCL 600.8302(1) and (3) provide a "more specific" grant of jurisdictional authority than the "general grant of jurisdictional power" found in MCL 600.8301(1). *Bruwer v Oaks* (*On*

Remand), 218 Mich App 392, 396; 554 NW2d 345 (1996), citing *Driver v Hanley*, 207 Mich App 13, 17-18; 523 NW2d 815 (1994). "Because § 8302(3) is specific, it takes precedence over § 8301(1)." *Bruwer*, 218 Mich App at 396, citing *Driver*, 207 Mich App at 17-18. Where a "district court's action flowed from its power arising under Chapter 57 of the RJA, its actions are within the scope of § 8302(3), and § 8301(1) is inapplicable." *Bruwer*, 218 Mich App at 396.

The Court in *Bruwer* faced an apparent "conflict between the two jurisdictional statutes regarding whether district courts have the jurisdiction to issue a judgment in excess of [the then-existing statutory limit of] $10,000 when the case arises under Chapter 57 of the RJA." *Id*. Resolving that apparent conflict in favor of the district court's exercise of jurisdiction under the circumstances presented, this Court held in *Bruwer* that a district court "had jurisdiction to issue" a $50,000 judgment on an appeal bond, in an action for "land contract forfeiture under the summary proceedings provisions of Chapter 57 of the [RJA]." *Id.* at 394, 396.

While it is true that a judgment entered by a court that lacks subject-matter jurisdiction is void, *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992), subject-matter jurisdiction is established by the *pleadings* and exists "when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993); see also *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996), citing *Luscombe v Shedd's Food Prod Corp*, 212 Mich App 537, 541; 539 NW2d 210 (1995) ("A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint.").

Because subject-matter jurisdiction is determined by reference to the pleadings, and because the complaint filed by the Clohsets in the district court invoked the district court's specific jurisdiction under MCL 600.8302(1) and (3) and chapter 57 of the RJA, that specific jurisdictional grant takes precedence over the more general jurisdictional grant found in MCL 600.8301(1), which is inapplicable here. See, *Bruwer*, 218 Mich App at 396. The district court accordingly had jurisdiction over this case.

Having properly acquired jurisdiction, the district court was obliged to render a final decision on the merits. " '[W]hen a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action.' " *Schafer v Knuth*, 309 Mich 133, 137; 14 NW2d 809 (1944), quoting *Maclean v Wayne Circuit Judge*, 52 Mich 257, 259; 18 NW 396 (1884). A matter is finally and completely resolved when a judgment is entered. "A judgment is defined as the final consideration and determination of a court of competent jurisdiction on the matters submitted to it." 6A Michigan Pleading & Practice (2d ed, 2003), § 42:1, p 235. In other words, once a court acquires jurisdiction, unless the matter is properly removed or dismissed, that court is charged with the duty to render a final decision on the merits of the case, resolving the dispute, with the entry of an enforceable judgment.

Consistent with *Bruwer*, and with its authority and obligation to render a judgment on a matter properly before it, the district court's specific jurisdiction over this case extended to the entry of a stipulated consent judgment presented by the parties, even though that

consent judgment included an agreed-upon monetary component that, if it had been premised on the district court's general jurisdiction, would have exceeded the otherwise applicable statutory jurisdictional limit.[2] The district court thus erred by granting plaintiff's motion to transfer the case to the circuit court.[3]

B. DEFENDANTS CANNOT COLLATERALLY ATTACK THE AGREED-UPON CONSENT JUDGMENT

When defendants defaulted on the settlement agreement, the Clohsets entered a consent judgment in the district court, in part for the $222,109.09 net amount then owed by defendants. This amount clearly exceeded the district court's general jurisdictional limit, if it applied here (which we find it did not[4]).

Even assuming arguendo that this monetary component of the stipulated consent judgment exceeded the district court's authority, defendants still could not properly collaterally attack the entry of that judgment. As the Michigan Supreme Court explained in *Bowie v Arder*, 441 Mich 23, 49; 490 NW2d 568 (1992), quoting *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 545; 260 NW 908 (1935) (citation omitted):

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[2] The fact that the Clohsets' district court complaint sought only equitable relief did not preclude the inclusion of monetary relief in the consent judgment. As MCR 2.601(A) provides, "every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings."

[3] We also are unaware of any published authority in Michigan that would sanction the "post-verdict" transfer of a case to the circuit court merely for *entry* of a judgment, much less (as here) for further proceedings 10 years *after* the entry of a judgment, and the unpublished authority, to the extent applicable, is disfavorable of such a transfer.

[4] As noted already in this opinion, the district court's general jurisdictional limit is "inapplicable" where, as here, the district court proceeds pursuant to its specific jurisdictional grant under chapter 57 of the RJA.

> " ' "Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked." ' "

In other words, "lack of subject matter jurisdiction can be collaterally attacked[, whereas] the exercise of that jurisdiction can be challenged only on direct appeal." *In re Hatcher*, 443 Mich at 439. See also MCR 7.101(A)(2) ("An order or judgment of a trial court reviewable in the circuit court may be reviewed only by an appeal.").

Here, for the reasons noted, there was no "want of jurisdiction." Rather, and because the district court had jurisdiction, it could at most be argued that the court erred in the "exercise of jurisdiction." Accordingly, as articulated in *Bowie* and *Jackson*, defendants were not entitled to attack this judgment collaterally during the 2009 proceedings; their only option, if any, was to challenge the error on direct appeal[5] or by a proper motion to alter or amend the judgment. Defendants took no such actions within the time allowed.[6] As a result, the original consent judgment, which was filed in

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[5] We recognize that an appeal as of right may not have been available to the parties with regard to the consent judgment, since they did not reserve the right of appeal in the consent judgment itself. *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 278 n 4; 597 NW2d 235 (1999), citing *Vanderveen's Importing Co v Keramische Industrie M deWit*, 199 Mich App 359; 500 NW 2d 779 (1993). This merely highlights the fact that defendants failed to preserve any right of appeal by which to properly challenge the entry of the consent judgment.

[6] Although defendants ultimately moved to vacate the October 1, 1999, consent judgment, they did not do so until October 14, 2009, over 10 years later. MCR 2.612(C)(2) provides that a motion to set aside a judgment as "void" must be made within a reasonable time. See also *Laffin v Laffin*, 280 Mich App 513, 521 n 1; 760 NW2d 738 (2008)

the district court on October 1, 1999, was valid, although arguably then voidable (not void) by proper and timely appeal or motion, and neither having occurred, the stipulated renewal of the consent judgment, filed in the district court in 2009, preserved the continued validity of the consent judgment. Plaintiff is therefore entitled to enforce the judgment against defendants.

This conclusion is not negated by the fact that the consent judgment provided stipulated relief that was different in kind from that initially requested in the district court complaint, nor by the fact that the monetary amount of the stipulated damages exceeded the general jurisdictional limit of the district court. For the reasons noted, the district court had specific subject-matter jurisdiction under chapter 57 of the RJA, and the general jurisdictional limit thus was "inapplicable." See, e.g., *Bruwer*, 218 Mich App at 396.

Moreover, "[a] consent judgment is different in nature from a judgment rendered on the merits because it is primarily the act of the parties rather than the considered judgment of the court. *No pleadings are required to support an agreed or negotiated judgment. Consequently, a judgment by consent is distinct from a judgment rendered by the court after trial.*" 46 Am Jur 2d, Judgments, § 184, p 528 (2006) (emphasis added). Consent decrees differ from typical judgments because the "voluntary nature of a consent decree is its most fundamental characteristic." *Local No 93, Int'l Ass'n of Firefighters, AFL-CIO, CLC v City of Cleveland*, 478 US 501, 522; 106 S Ct 3063; 92 L Ed 2d 405 (1986) (the agreement of the parties "serves as the source of the court's authority to enter any judgment at all"). See also *Goldberg v Trustees of Elmwood Cemetery*, 281

(applying the rule to a consent judgment). Defendants' 10-year delay was not reasonable under the circumstances of this case.

Mich 647, 649; 275 NW 663 (1937) ("A judgment by consent cannot ordinarily be set aside or vacated by the court without consent of the parties thereto for the reason it is not the judgment of the court but the judgment of the parties.");[7] *Walker v Walker*, 155 Mich App 405, 406; 399 NW2d 541 (1986) ("When a party approves an order or consents to a judgment by stipulation, the resultant judgment or order is binding upon the parties and the court. Absent fraud, mistake or unconscionable advantage, a consent judgment cannot be set aside or modified without the consent of the parties, nor is it subject to appeal.") (citations omitted).

Accordingly, the fact that the Clohsets' complaint did not seek money damages, and the fact that the stipulated money damages (as set forth in the consent judgment) exceeded the general jurisdictional amount otherwise applicable in the district court, does not preclude enforcement of the consent judgment.

C. HAVING CREATED THE ALLEGED ERROR IN THE ENTRY OF THE CONSENT JUDGMENT, DEFENDANTS MAY NOT HARBOR THAT ALLEGED ERROR AS AN APPELLATE PARACHUTE

As noted at the outset of this opinion, it seems fundamental that a party may not properly create error in a lower court, and then claim on appeal that the error requires reversal. See, e.g., *Dresselhouse*, 177 Mich App at 477 ("A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper [in the trial court] since to do so would permit the party to harbor error as an appellate parachute.").

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[7] The Supreme Court in *Goldberg* noted that "a consent decree, in order to be valid, must come within the jurisdiction of the court and cannot confer jurisdiction where the law confers none." *Id*. Here, however, the parties' consent judgment did not "confer jurisdiction where the law confers none." Rather, as noted, the district court possessed specific subject-matter jurisdiction pursuant to chapter 57 of the RJA.

Here, defendants stipulated to the entry of the consent judgment. The district court relied on that stipulation in entering the consent judgment on October 1, 1999. Even assuming arguendo that the consent judgment was premised on an error in the exercise of the district court's jurisdiction, that error was of the parties' own creation. Having created that error by stipulating to the entry of the consent judgment, defendants cannot now be heard to complain about that alleged error. To sanction such an argument would be to permit defendants to harbor their own error as an "appellate parachute," which we decline to do.

D. PLAINTIFF MAY ENFORCE THE CONSENT JUDGMENT ACCORDING TO ITS TERMS

We are cognizant of the fact that, generally speaking, a district court cannot enter a judgment that exceeds its jurisdictional limit. See, e.g., *Zimmer v Schindehette*, 272 Mich 407, 409; 262 NW 379 (1935) (a judgment rendered by a justice of the peace held void where it was in an amount in excess of the justice's jurisdiction); *Krawczyk v DAIIE*, 117 Mich App 155, 163; 323 NW2d 633 (1982), rev'd in part on other grounds 418 Mich 231 (1983) (a judgment awarded in the district court exceeding the then-existing jurisdictional limit of $10,000 not invalid, provided that amounts in excess of the jurisdictional limit can be attributed to costs, attorney fees, and interest, or that the case represents an exception, specified by statute, that would permit the court to render a judgment over the jurisdictional amount).

However, we find that general rule to be inapplicable to the circumstances presented here. In the cited cases, the plaintiffs' claims fell within the general jurisdiction of the court, and the judgments in those cases were thus

constrained by the amount-in-controversy limitations of the courts' general jurisdiction. By contrast, the Clohsets' claims fell within the district court's specific jurisdiction under chapter 57 of the RJA, and those general jurisdictional limits were thus "inapplicable." See, e.g., *Bruwer*, 218 Mich App at 396.

Even assuming arguendo that the general jurisdictional limit applied, it might at most be argued that the monetary amount of the consent judgment in excess of the $25,000 general jurisdictional limit (plus interest, costs, and attorney fees) was not recoverable, not that the entirety of the judgment was void. This was the result, for example, in *Brooks v Mammo*, 254 Mich App 486, 496; 657 NW2d 793 (2002), where this Court limited the plaintiff's recovery to the district court's $25,000 general jurisdictional limit.

But the circumstances in *Brooks* were in any event unusual and largely inapplicable here. In *Brooks*, the plaintiff had brought suit in the circuit court for an amount in excess of the then applicable $10,000 district court general jurisdictional limit. Following a mediation evaluation of $3,500, the circuit court transferred the case to the district court, which held a jury trial that resulted in a jury verdict in the plaintiff's favor in the amount of $50,000. As of the trial date, former MCL 600.641 (which is not at issue here, but which had permitted the removal of circuit court actions to the district court even where the amount in controversy otherwise would preclude it, and which further made lawful subsequent jury verdicts in excess of the otherwise applicable jurisdictional limit) had been repealed. Before the judgment was entered on the jury verdict in the district court, the jurisdictional limit of the district court also had been increased to $25,000. This Court thus was

compelled "to determine the combined effect that the repeal of MCL 600.641 and the subsequent amendment of MCL 600.8301 have on the verdict returned by the jury in this case." *Brooks*, 254 Mich App at 493. This Court held that, under the circumstances presented, the plaintiff was entitled to a damages judgment, but neither in the amount of the jury verdict nor the amount of the district court's jurisdictional limit at the time of trial. Rather, the plaintiff was entitled to damages in the amount of the newly increased $25,000 jurisdictional limit.

Even if *Brooks* were applicable here, it would not void the consent judgment. Rather, it would only limit the recoverability of the judgment to the amount of the district court's general jurisdictional limit of $25,000 (plus interest, costs, and attorney fees).[8] As noted, however, we find that in light of the district court's

[8] Even if the enforceability of the district court consent judgment were so limited (which we expressly do not find), the settlement agreement does not on its face appear to set any time limit for the entry of either version of the consent judgment. Therefore, even under defendants' reading of the settlement agreement (i.e., that the waiver of defenses found in section VI of the settlement agreement related not to a later filing of a suit for breach of the settlement agreement, but rather to the *entry* of judgment), it appears (absent enforcement of the consent judgment in the district court) that defendants have waived any defenses to the entry of the circuit court consent judgment, should plaintiff proceed to file it. This is because the settlement agreement states that the waiver of defenses relates to the "entry of either or both" forms of the consent judgment, i.e., the version prepared for entry in the district court and the version prepared for entry in the circuit court. While only the former has to date been filed, the settlement agreement provides that, in the event of a default: (a) plaintiff may file the district court version of the consent judgment "and/or" the circuit court version; (b) defendants are obliged to "consent to all steps necessary to effectuate the entry of either or both" such versions; and (c) defendants' waiver of defenses relates to the entry of "either or both" versions of the consent judgment.

specific jurisdiction in this case, the general jurisdictional limit was inapplicable.

E. THE CIRCUIT COURT ERRED BY RULING ON THE MERITS

Because the district court had jurisdiction over this case and improperly transferred the case to the circuit court, the circuit court was completely without jurisdiction to rule on plaintiff's motion to enter the consent judgment, on defendants' motion to dismiss or, later, on the parties cross-motions for summary disposition. Accordingly, the circuit court erred by ruling on those motions, and should instead have transferred the case back to the district court pursuant to MCR 2.227.

Having reached the above conclusions, we need not address plaintiff's remaining arguments on appeal.[9]

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[9] The Court notes that, while not necessary to its decision in this case, it is unpersuaded in any event that plaintiff lacked proper alternative claims for breach of the settlement agreement, breach of the consent judgment, or otherwise, or that those claims would be barred by the applicable statute(s) of limitations, or otherwise. Therefore, absent enforcement of the consent judgment, plaintiff may still have a valid cause of action, in an appropriate court, for those alternative claims.

In that regard, this Court is compelled to note that it is particularly troubled that, in contesting plaintiff's argument that they waived the statute of limitations defense, and while accusing plaintiff of a "blatant mischaracterization" of the settlement agreement, defendants have used an ellipsis to categorically alter the meaning of the waiver provision of the settlement agreement. Rather than *preserving* "substantive defenses," as defendants suggest, the actual language of the settlement agreement confirms that such defenses are *waived*. This Court makes no judgment at this juncture regarding whether defendants made this representation intentionally or merely in error. The Court additionally notes that the statute of limitations is not, as defendants suggest, a "substantive" defense, but rather is a "procedural one," so that it would have been waived even under defendants' errant reasoning. *Staff v Johnson*, 242 Mich App 521, 531; 619 NW2d 57 (2000).

IV. CONCLUSION

We vacate the judgment of the circuit court and remand to the district court for reinstatement and enforcement of the consent judgment. We do not retain jurisdiction.

K. F. KELLY, P.J., and WILDER, J., concurred with BOONSTRA, J.

PEOPLE v BRANTLEY

Docket No. 298488. Submitted March 14, 2012, at Detroit. Decided May 17, 2012, at 9:00 a.m. Amended, 296 Mich App 801. Leave to appeal denied, 493 Mich 877.

Hawk H. Brantley was convicted by a jury in the Oakland Circuit Court of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(e), and larceny from the person, MCL 750.357, for raping a former girlfriend at knifepoint and taking her personal property. The court, Shalina D. Kumar, J., sentenced defendant to serve concurrent prison terms of 4 to 10 years for the larceny conviction and 12 to 40 years for the CSC-I conviction, as well as lifetime electronic monitoring pursuant to MCL 750.520n following his release. Defendant appealed.

The Court of Appeals *held*:

1. The prosecution presented sufficient evidence to prove defendant's guilt beyond a reasonable doubt. With respect to the CSC-I charge, defendant was convicted of engaging in sexual penetration with another person while armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon. Sexual penetration includes any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. The complainant's testimony can, by itself, be sufficient to support a conviction of CSC-I. In this case, the victim testified that defendant put his forearm on her throat with enough pressure that she could not breathe, produced a black folding knife and put the edge of it on her throat, pulled her pants down around her knees, and flipped her onto her stomach and inserted his penis into her vagina from behind. The victim had a scratch on her neck that was consistent with her allegation that defendant held a knife to her neck. In addition, the victim identified defendant as her attacker, defendant could not be excluded as a possible source of the semen that was collected, and defendant was arrested with a black folding knife in his possession. Taken as a whole, this evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant engaged in sexual penetration with the victim while he was armed with a weapon. Defendant was also convicted of larceny from the person, which

requires the prosecution to prove that the defendant took someone else's property without consent, moved the property, intended to steal or permanently deprive the owner of the property, and took the property from the person or from the person's immediate area of control or immediate presence. The victim testified that defendant took her cell phone, money, and purse without her permission while she and defendant were together in his car. Furthermore, the victim's cousin testified that defendant had the victim's cell phone after the assault, told the victim's cousin not to call the phone again, and then used the phone to call the victim's cousin back. Finally, the evidence indicated that the victim was missing her cell phone after the assault. This evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that defendant committed all the essential elements of larceny from the person.

2. The jury's verdicts were not against the great weight of the evidence. A new trial based on a challenge to the weight of the evidence should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. In general, conflicting testimony or questions concerning the credibility of the witnesses are not sufficient grounds for a new trial. The evidence presented at trial did not preponderate heavily against the jury's CSC-I verdict. In addition to her identification of defendant, the evidence of the scratch, and the testimony concerning the source of the semen, the victim relayed consistent versions of the assault to her sister, the emergency room doctor, and the forensic nurse who examined her. Although there was no acute injury to the victim's vagina, the forensic nurse testified that this was not unusual for a victim of sexual assault. The aspects of the victim's testimony that defendant argued cast doubt on her credibility did not make her story so unreliable that a reasonable jury could not have believed it. The evidence presented at trial concerning the victim's property also did not preponderate heavily against the jury's verdict regarding larceny from a person.

3. The trial court erroneously assessed 10 points for offense variable (OV) 10 (exploitation of victim) when imposing the sentence for the CSC-I conviction. Under MCL 777.40 a trial court may assess 10 points for OV 10 if the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or if the offender abused his or her authority status. In the context of OV 10, a domestic relationship is a familial or cohabitating relationship, not merely a past dating relationship. In this case, the trial court incorrectly

found that defendant and the victim were involved in a domestic relationship because they had stopped dating at least two months before the assault, they were dating other people, they did not continue to have sex, and they did not live together. Because the trial court imposed a minimum sentence that was based on an erroneous interpretation of OV 10 and fell outside the appropriate minimum sentence range under the sentencing guidelines, defendant's CSC-I sentence had to be vacated and the case remanded for resentencing.

4. The trial court did not err by ordering defendant to submit to lifetime electronic monitoring following his release from prison despite the fact that the victim was 21 years old when defendant sexually assaulted her. MCL 750.520b(2)(d) provides that in addition to any other penalty imposed, the court must sentence a defendant convicted of CSC-I to lifetime electronic monitoring under MCL 750.520n, which in turn provides that a "person convicted under [MCL 750.520b] or [MCL 750.520c] for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age" must be sentenced to lifetime electronic monitoring. Applying the last-antecedent rule indicated that the Legislature intended the modifying phrase "for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age" to apply to convictions of second-degree criminal sexual conduct (CSC-II) under MCL 750.520c only, and not to convictions of CSC-I under MCL 750.520b. Further, because MCL 750.520b(2)(d), MCL 750.520c(2)(b), and MCL 750.520n(1) address the same subject and share a common purpose, they are *in pari materia* and must be read together as a unified whole. While MCL 750.520b(2)(d) is silent regarding age, MCL 750.520c(2)(b) states with respect to individuals convicted of CSC-II that the court must sentence the defendant to lifetime electronic monitoring if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age. Accordingly, MCL 750.520n(1) requires a trial court to impose lifetime electronic monitoring when any defendant is convicted of CSC-I under MCL 750.520b and when a defendant who is 17 years old or older is convicted of CSC-II under MCL 750.520c against a victim who is less than 13 years old.

Convictions affirmed; sentence for CSC-I vacated and case remanded for correction of the sentencing information report and resentencing.

K. F. KELLY, J., concurring in part and dissenting in part, agreed with the majority except with respect to its affirmation of the

imposition of lifetime electronic monitoring. She would have vacated that portion of the judgment of sentence and held that the plain language of MCL 750.520b(2)(d) and MCL 750.520n requires the imposition of lifetime electronic monitoring only when the victim is less than 13 years old and the defendant is 17 years old or older, even if the defendant was convicted of CSC-I.

1. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — SENTENCES — LIFETIME ELECTRONIC MONITORING.

MCL 750.520n(1) requires a trial court to impose lifetime electronic monitoring when a defendant is convicted of first-degree criminal sexual conduct under MCL 750.520b and when a defendant who was 17 years old or older is convicted of second-degree criminal sexual conduct under MCL 750.520c if the victim was less than 13 years old.

2. CRIMINAL LAW — SENTENCES — OFFENSE VARIABLE 10 — EXPLOITATION OF A DOMESTIC RELATIONSHIP.

A trial court may assess 10 points for offense variable 10 (exploitation of victim) if the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or if the offender abused his or her authority status; in the context of offense variable 10, a domestic relationship is a familial or cohabitating relationship, not merely a past dating relationship (MCL 777.40[1][b]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Rae Ann Ruddy*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marla R. McCowan*) for defendant.

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

JANSEN, J. Defendant appeals by right his jury-trial convictions of first-degree criminal sexual conduct

(CSC-I), MCL 750.520b(1)(e) (armed with a weapon), and larceny from the person, MCL 750.357. He was sentenced to serve concurrent prison terms of 12 to 40 years for the CSC-I conviction and 4 to 10 years for the larceny-from-the-person conviction. He was also ordered to submit to lifetime electronic monitoring following his release from prison. We affirm defendant's convictions, but vacate his sentences in part and remand for resentencing consistent with this opinion.

I

Defendant first argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that he committed the crimes. We disagree.

Claims of insufficient evidence in a criminal case are reviewed de novo, with the evidence viewed in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We must determine whether a rational trier of fact could have found that all the essential elements of the offenses were proved beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences arising therefrom may be used to prove the elements of a crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "[T]his Court must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). It is the role of the jury to " 'determine questions of fact and assess the credibility of witnesses.' " *People v Cameron*, 291 Mich App 599, 616; 806 NW2d 371 (2011), quoting *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Defendant was convicted under MCL 750.520b(1)(e), which provides that "[a] person is guilty of criminal

sexual conduct in the first degree if he or she engages in sexual penetration with another person" and "is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon." "Sexual penetration" is defined, in relevant part, as "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(r); see also *People v Szalma*, 487 Mich 708, 712 n 5; 790 NW2d 662 (2010). "[T]he complainant's testimony can, by itself, be sufficient to support a conviction" of criminal sexual conduct. *Id.* at 724; see also MCL 750.520h.

Defendant was also convicted under MCL 750.357, which provides in pertinent part that "[a]ny person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony . . . ." As this Court observed in *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), to prove the elements of larceny from a person, the prosecution must show that the defendant (1) took someone else's property without consent, (2) moved the property, (3) intended to steal or permanently deprive the owner of the property, and (4) took the property from the person or from the person's immediate area of control or immediate presence.

We first conclude that the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant committed CSC-I under MCL 750.520b(1)(e). The victim testified that defendant put his forearm on her throat with enough pressure that she could not breathe, that defendant produced a black folding knife and put the edge of the knife on her throat, that defendant pulled her pants down around her knees, and that defendant flipped her over onto her

stomach and inserted his penis into her vagina from behind. The victim had a scratch on her neck that was consistent with her allegation that defendant held a knife to her neck. In addition, the victim identified defendant as her attacker, and defendant could not be excluded as a possible source of the semen that was collected. Lastly, defendant was arrested with a black folding knife in his possession. Taken as a whole, this evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant engaged in sexual penetration with the victim while he was armed with a weapon. See MCL 750.520b(1)(e).

We also conclude that the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant committed the offense of larceny from the person. The victim testified that defendant took her cell phone, money, and purse without her permission while they were in his car. Furthermore, the victim's cousin testified that defendant had the victim's cell phone after the assault, that defendant told the victim's cousin not to call the cell phone again, and that defendant then used the cell phone to call the victim's cousin back. Finally, the evidence indicated that the victim was missing her cell phone after the assault. This evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant had committed all the essential elements of the offense of larceny from the person. See *Perkins*, 262 Mich App at 271-272.

II

Defendant also argues that the jury's verdicts were against the great weight of the evidence. Again, we disagree.

We review unpreserved claims that the verdict was against the great weight of the evidence for plain error affecting the defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). " '[A] new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.' " *Lemmon*, 456 Mich at 642 (citation omitted). In general, conflicting testimony or questions concerning the credibility of the witnesses are not sufficient grounds for granting a new trial. *Id*. at 643.

The evidence presented at trial did not preponderate heavily against the jury's CSC-I verdict. The victim testified regarding the sexual assault. She relayed consistent versions of the assault to her sister, the emergency room doctor, and the forensic nurse who examined her. The victim also identified defendant as her attacker. She had a scratch on her neck that was consistent with her allegation that defendant held a knife to her neck. When she spoke to her sister and the forensic nurse, she was shaken and upset. Although there was no acute injury to the victim's vagina, the forensic nurse testified that this was not unusual for a victim of sexual assault. Moreover, defendant could not be excluded as a possible source of the semen. Defendant was arrested with a black folding knife that matched the weapon used during the assault. Furthermore, the facts that the victim could not judge how far defendant had parked his car from a school security guard and that the victim may have lied about a previous consensual encounter did not make her story so unreliable that a reasonable jury could not have believed it.

Similarly, the evidence presented at trial did not preponderate heavily against the jury's larceny-from-the-person verdict. The victim testified that defendant took

her cell phone, money, and purse. This testimony was supported by evidence that the victim had to use a school security guard's cell phone to call her sister. Moreover, the victim's cousin testified that defendant had the victim's cell phone after the assault. The jury's verdicts were not against the great weight of the evidence.

III

Defendant next argues that the trial court erroneously assessed 10 points for offense variable (OV) 10, MCL 777.40, when sentencing him for the CSC-I conviction. We agree and remand for resentencing with respect to the CSC-I conviction.

We review a trial court's scoring decisions under the sentencing guidelines to determine whether the court properly exercised its discretion and whether the record adequately supports a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). "An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence." *Id.*; see also MCL 769.34(10).

Pursuant to MCL 777.40(1)(b), a trial court may assess 10 points for OV 10 if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]" In the context of OV 10, this Court has recently defined a "domestic relationship" as "a familial or cohabitating relationship . . . ." *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011). This Court specifically rejected the proposition that a past dating relationship would fall within the definition of a "domestic relationship" under MCL 777.40(1)(b). *Id.* at 447-448.

Given this Court's decision in *Jamison*, we conclude that the trial court erroneously assessed 10 points for OV 10. Defendant and the victim had stopped dating at least two months prior to the assault. Although they remained friends, both were dating other people, they did not continue to have sex, and they did not live together. Indeed, the victim and defendant had limited contact. Although defendant took the victim to school and they occasionally talked on the phone, this did not constitute a domestic relationship for the purpose of scoring OV 10. The trial court incorrectly found that defendant and the victim were involved in a domestic relationship.

If the trial court had properly assessed zero points rather than 10 points for OV 10, defendant's total offense variable score would have been 35 points instead of 45 points. This would have placed defendant in cell D-II, rather than cell D-III, on the sentencing grid for class A felony offenses. MCL 777.62. The recommended minimum sentence range for offenders falling in cell D-II on the class A felony grid is 81 to 135 months in prison. *Id*. However, the trial court imposed a minimum sentence of 144 months in prison in this case. This minimum sentence fell outside defendant's correct guidelines range of 81 to 135 months. Because defendant's minimum sentence was based on an erroneous interpretation of OV 10 and fell outside the appropriate guidelines range, we vacate the sentence imposed for defendant's CSC-I conviction and remand for resentencing. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

IV

Defendant also argues that the trial court erred by ordering him to submit to lifetime electronic monitoring following his release from prison. We disagree.

"Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed de novo." *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010).

With respect to an individual convicted of CSC-I, MCL 750.520b(2)(d) provides in pertinent part that "[i]n addition to any other penalty imposed . . . , the court shall sentence the defendant to lifetime electronic monitoring under section 520n." In turn, MCL 750.520n(1) provides that "[a] person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . ."

Defendant contends that, pursuant to MCL 750.520b(2)(d) and MCL 750.520n(1), a trial court must order a defendant who is convicted of CSC-I to submit to lifetime electronic monitoring *only* if the defendant was 17 years old or older and the victim was less than 13 years old. Because the victim in this case was 21 years old when defendant sexually assaulted her, defendant asserts that he should not have been subjected to lifetime electronic monitoring. Defendant's argument is compelling. Indeed, as the dissent points out, several panels of this Court have agreed with that interpretation and held that lifetime electronic monitoring is required for a CSC-I conviction *only* if the defendant was 17 years old or older and the victim was less than 13 years old. See *People v Floyd*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket No. 297393); *People v Quintana*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295324); *People v Hampton*, unpublished opinion per curiam of the Court

of Appeals, issued December 20, 2011 (Docket No. 297224); *People v Bowman*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2010 (Docket No. 292415). However, those decisions are unpublished and nonbinding, and although we are fully cognizant of the rule of interpretation requiring adherence to the plain language of a statute, we refuse to look at the language in a vacuum and ignore other clearly relevant statutory rules of construction.

Taken alone, the language of MCL 750.520n(1) does seem to indicate that a trial court must order a defendant who is convicted of CSC-I to submit to lifetime electronic monitoring *only* if the defendant was 17 years old or older and the victim was less than 13 years old. However, having examined this provision in context and compared it to MCL 750.520c, we conclude that the Legislature intended the modifying phrase "for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age" to apply to convictions of second-degree criminal sexual conduct (CSC-II) under MCL 750.520c *only*, and *not* to convictions of CSC-I under MCL 750.520b. Under the "last antecedent" rule, a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent unless something in the statute requires a different interpretation. *Duffy v Dep't of Natural Resources*, 490 Mich 198, 220-221; 805 NW2d 399 (2011); see also *People v Henderson*, 282 Mich App 307, 328; 765 NW2d 619 (2009). Within the text of MCL 750.520n(1), the last antecedent preceding the modifying phrase "for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age" is "[§] 520c," indicating that the Legislature intended the phrase to modify "[§] 520c" only.

This reading of MCL 750.520n(1) is further supported by the language of MCL 750.520b(2)(d) and MCL 750.520c(2)(b). Because MCL 750.520b(2)(d), MCL 750.520c(2)(b), and MCL 750.520n(1) address the same subject and share a common purpose, they are *in pari materia* and must be read together as a unified whole. *Kern*, 288 Mich App at 517. As explained previously, MCL 750.520b(2)(d) states, with respect to individuals convicted of CSC-I, that "[i]n addition to any other penalty imposed . . . the court shall sentence the defendant to lifetime electronic monitoring under section 520n." MCL 750.520b(2)(d) is notably silent regarding the age of the defendant or the age of the victim. In contrast, MCL 750.520c(2)(b) states, with respect to individuals convicted of CSC-II, that "[i]n addition to the penalty specified in [MCL 750.520c(2)(a)], the court shall sentence the defendant to lifetime electronic monitoring under section 520n *if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age*." (Emphasis added.) Thus, while the CSC-II statute specifically limits the requirement of lifetime electronic monitoring to defendants who are 17 years old or older and whose victims are younger than 13 years old, the CSC-I statute contains no such age-based limitation. If the Legislature had intended the age-based limitation to apply to CSC-I convictions, it would have so provided, given that, as MCL 750.520c(2)(b) demonstrates, it clearly was aware of how to draft the statute in a way that would have effectuated that intent. And the omission in one part of a statute of a provision that is included in another part should be construed as intentional. *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006). Accordingly, we read MCL 750.520n(1) as requiring the trial court to impose lifetime electronic monitoring in either of two different circumstances: (1)

when any defendant is convicted of CSC-I under MCL 750.520b, and (2) when a defendant who is 17 years old or older is convicted of CSC-II under MCL 750.520c against a victim who is less than 13 years old. In other words, we hold that any defendant convicted of CSC-I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring. MCL 750.520b(2)(d); MCL 750.520n(1). In sum, the trial court did not err by imposing the requirement of lifetime electronic monitoring on the basis of defendant's CSC-I conviction.[1]

V

We affirm defendant's convictions. We also affirm the trial court's imposition of lifetime electronic monitoring on the basis of defendant's CSC-I conviction.

We vacate defendant's sentence of 12 to 40 years in prison and remand for resentencing with respect to defendant's CSC-I conviction. The trial court shall modify the sentencing information report to indicate defendant's correct minimum sentence range under the guidelines and shall enter an amended judgment of sentence after resentencing.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

WHITBECK, P.J., concurred with JANSEN, J.

[1] In light of our conclusion in this regard, we reject defendant's argument that his attorney rendered ineffective assistance of counsel by failing to object to the trial court's imposition of lifetime electronic monitoring. It is well settled that counsel is not ineffective for failing to advocate a meritless position or make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

K. F. KELLY, J. (*concurring in part and dissenting in part*). I agree with the majority that defendant's convictions for first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(e) (armed with a weapon), and larceny from the person, MCL 750.357, must be affirmed. I also agree with the majority that the case must be remanded for resentencing because the sentencing court erred by assessing 10 points for offense variable (OV) 10, MCL 777.40, when there was no evidence that defendant and the victim were involved in a domestic relationship. However, I write separately to dissent from that portion of the majority's opinion affirming the sentencing court's imposition of lifetime electronic monitoring. Because the plain language of MCL 750.520n(1) clearly applies only when the victim is less than 13 years of age and the defendant is 17 years old or older, I would vacate the imposition of lifetime electronic monitoring.

I. STANDARD OF REVIEW

"Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed de novo." *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010).

> The primary goal of statutory construction is to give effect to the Legislature's intent. The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. An unambiguous statute is enforced as written. It is only when statutory language is ambiguous that a court may look outside the statute to ascertain legislative intent. A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. [*Id.* at 516-517 (quotation marks, brackets, and citations omitted).]

II. ANALYSIS

Defendant argues that the plain language of MCL 750.520n does not require lifetime electronic monitoring when the sexual assault victim is an adult. I agree. When MCL 750.520b(2)(d) is read with MCL 750.520n, the clear result is that lifetime electronic monitoring is only required when the victim is less than 13 years old and the defendant is 17 years of age or older.

MCL 750.520b(2) provides:

> Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
>
> (c) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or [MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or [MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] committed against an individual less than 13 years of age.
>
> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.520n].

MCL 750.520n(1) provides:

> A person convicted under [MCL 750.520b or MCL 750.520c] for criminal sexual conduct committed by an

> individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . .

The majority concludes that MCL 750.520n(1)

> requir[es] the trial court to impose lifetime electronic monitoring in either of two different circumstances: (1) when any defendant is convicted of CSC-I under MCL 750.520b, and (2) when a defendant who is 17 years old or older is convicted of [second-degree criminal sexual conduct (CSC-II)] under MCL 750.520c against a victim who is less than 13 years old.

The majority comes to this conclusion by comparing the language of MCL 750.520b and MCL 750.520c (CSC-II). MCL 750.520c(2) provides:

> Criminal sexual conduct in the second degree is a felony punishable as follows:
>
> (a) By imprisonment for not more than 15 years.
>
> (b) In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.520n] if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.

The majority holds that "while the CSC-II statute specifically limits the requirement of lifetime electronic monitoring to defendants who are 17 years old or older and whose victims are younger than 13 years old, the CSC-I statute contains no such age-based limitation." On this basis, the majority concludes that "any defendant convicted of CSC-I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring."

In reaching its conclusion, I believe that the majority rewrites the legislation to say something that it does

not. The majority would reform the statute to say what the majority believes it ought to say rather than what the Legislature has clearly and unequivocally stated. That is beyond our province as an appellate court.

In *Kern*, this Court was asked to determine whether lifetime electronic monitoring for defendants convicted of CSC-II applied only to persons who had been released on parole or from prison. *Kern*, 288 Mich App at 514-515. *Kern* does not answer the question whether MCL 750.520n(1) only requires lifetime electronic monitoring for CSC-I when the victim is less than 13 years old, but *Kern* does buttress my belief that the majority has overstepped its bounds in looking beyond the clear language of the statute. The result in *Kern* depended on the interplay between the Michigan Penal Code, MCL 750.1 *et seq*., and the Corrections Code, MCL 791.201 *et seq*. *Kern*, 288 Mich App at 517-518. We concluded that lifetime electronic monitoring "applies only to persons who have been released on parole or from prison, or both, and, therefore, does not apply to defendant, who was sentenced to five years' probation, with 365 days to be served in jail." *Id.* at 519. Reading the two codes *in pari materia*, we noted:

> MCL 750.520n(1) of the Michigan Penal Code directs that defendants shall be sentenced to lifetime electronic monitoring as provided under MCL 791.285 of the Corrections Code. Because the latter statute only provides for the implementation of a lifetime electronic monitoring program for those defendants who are released on parole or from prison, or both, defendants given probation or sent to jail are not subject to such monitoring. [*Id.* at 522-523.]

We acknowledged that

> the Legislature used the terms "parole" and "prison" and did not use the terms "probation" or "jail." A court may not engraft on a statutory provision a term that the Legislature

> might have added to a statute but did not. The Legislature's distinction between "parole" and "probation," and "prison" and "jail," must be respected. [*Id.* at 522 (citation omitted).]

This deference to the Legislature must prevail:

> The prosecution persuasively argues that persons convicted of [CSC-II] for conduct committed by an individual 17 years of age or older against an individual less than 13 years old and sentenced to probation or jail time present a similar, if not the same, risk to the public as those sentenced to time in prison and, therefore, should be subject to lifetime electronic monitoring. But "arguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). Whether the Legislature's actions are due to concerns about taxing county resources, a strategic decision that crimes resulting in sentences to jail or probation do not merit the time and expense involved with lifetime electronic monitoring in addition to maintaining the defendant's listing on the Michigan public sex offender registry, or a mere drafting oversight is not for us to decide. While the Legislature may deem it necessary to make changes to the statutory scheme to provide for the monitoring of persons sentenced to probation or jail time, such changes are not within the province of the judicial branch. Because this is a particularly important matter of public interest, we urge the Legislature to review whether it was indeed the intent of that body to exclude from lifetime electronic monitoring individuals convicted of [CSC-II] who are sentenced to probation or jail time. [*Id.* at 524-525.]

Again, while *Kern* may not directly answer the question before us, it certainly guides our statutory interpretation and reminds us that we must defer to the clear unequivocal language used by the Legislature.

While I recognize that unpublished opinions are not precedentially binding under the rules of stare decisis, MCR 7.215(C)(1), there have been several recent un-

published cases concerning lifetime electronic monitoring sentences in which the victim was over the age of 13, and I find their analysis persuasive. In *People v Quintana*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295324), p 7, this Court vacated the defendant's lifetime electronic monitoring sentencing condition because the victim was older than 13:

> We conclude that although the legislature may have intended to subject all individuals convicted [of CSC-I] to lifetime electronic monitoring, the legislature's intent is irrelevant to our determination because the statutory language is unambiguous. MCL 750.520b(2)(d) explicitly references MCL 750.520n, which only applies where the victim is younger than 13. For this Court to accept the prosecution's interpretation of MCL 750.520b(2)(d), it would essentially be required to ignore that provision's reference to MCL 750.520n. Stated differently, if the legislature desired to subject all individuals convicted of [CSC-I] to lifetime electronic monitoring, the controlling statute would not have included the language that we emphasize below:
>
> "In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring **under section 520n**."
>
> Under the rules of statutory interpretation, we cannot simply disregard the specific language utilized by the legislature. As a result, the portion of the Judgment of Sentence requiring lifetime electronic monitoring is vacated.

In *People v Bowman*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2010 (Docket No. 292415), the defendant was convicted of two counts of *first-degree* criminal sexual conduct. We found no support for the sentencing court's imposition of lifetime electronic monitoring when the victim was over the age of 13:

> Here, it is undisputed that the complainant was 14 years old at the time of defendant's offenses. The prosecution concedes that the trial court erred in imposing the lifetime tether requirement.[1] Accordingly, we remand to the trial court for it to engage in the ministerial task of removing the lifetime tether provision from defendant's judgment of sentence. [*Id*., unpub op at 6.]

In *People v Hampton*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 297224), the defendant was convicted of six counts of *first-degree* criminal sexual conduct. We vacated the lifetime electronic monitoring from the defendant's sentence because the victim was over the age of 13:

> The criminal sexual conduct statute instructs that "the court shall sentence the defendant to lifetime electronic monitoring under section 520n." MCL 750.520b(2)(d). Pursuant to MCL 750.520n(1), a "person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring." The goal of statutory construction is to give effect to the Legislature's intent. The Legislature is presumed to have intended the meaning it plainly expressed and clear statutory language must be enforced as written.
>
> Accordingly, the plain language of the statute as written requires the conclusion that defendant is entitled to have the lifetime electronic monitoring portion of his sentence vacated because the victim in this case was 14 and 15 years old at the time of the offenses. The prosecution's argument that the Legislature intended to provide mandatory lifetime electronic monitoring for all persons convicted of [CSC-I] is not supported by the plain language of the statute. [*Id*., unpub op at 10 (citations omitted).]

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[1] I note that the Oakland County Prosecutor's Office has now taken two different positions on this issue. Whereas in *Bowman* the prosecution conceded error in imposing lifetime tethering, it now argues to the contrary on this appeal.

In *People v Floyd*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket No. 297393), the defendant was convicted of four counts of *first-degree* criminal sexual conduct. We vacated the lifetime electronic monitoring from the defendant's sentence because the victim was over the age of 13:

> Although the prosecution argues that the Legislature intended to provide mandatory lifetime electronic monitoring for all persons convicted of [CSC-I] with MCL 750.520b(2)(d), that interpretation is not supported by a plain reading of the statute. Specifically, MCL 750.520b directs the trial court to MCL 750.520n to determine if lifetime electronic monitoring is mandatory. Under MCL 750.520n, lifetime electronic monitoring is only mandatory when the defendant is 17 years of age or older and the victim is younger than 13 years old. *See People v Kern*, 288 Mich App 513, 519; 794 NW2d 362 (2010) ("Standing alone, the terms of MCL 750.520c and MCL 750.520n indicate that all defendants convicted of second-degree CSC for conduct committed by an individual 17 years of age or older against an individual less than 13 years old are subject to lifetime electronic monitoring, without exception."). The victim here was older than 13 at the time of the assaults, therefore, MCL 750.520n does not apply. Accordingly, we vacate the trial court's judgment to the extent that it ordered defendant to be subject to lifetime electronic monitoring. [*Id.*, unpub op at 6.]

A plain reading of MCL 750.520b(2)(d) and MCL 750.520n(1) provides that, even in the case of CSC-I, lifetime electronic monitoring is only required when the victim is less than 13 years old and the defendant is 17 years old or older.

I would vacate that portion of defendant's sentence mandating lifetime electronic monitoring.

DAVIS v CITY OF DETROIT FINANCIAL REVIEW TEAM

McNEIL v CITY OF DETROIT FINANCIAL REVIEW TEAM

Docket Nos. 309218, 309250, and 309482. Submitted May 3, 2012, at Lansing. Decided May 21, 2012, at 9:00 a.m.

Robert Davis and Edward McNeil brought separate actions in the Ingham Circuit Court against the City of Detroit Financial Review Team, the Governor, and the State Treasurer, asserting that defendants had violated the Open Meetings Act (OMA), MCL 15.261 *et seq*. Davis sought a declaratory judgment, which the court, William E. Collette, J., granted, holding that the Detroit Financial Review Team, which was created under the Local Government and School District Fiscal Accountability Act, MCL 141.1501 *et seq*., commonly known as the emergency financial manager act (EFMA), was a public body subject to the provisions of the OMA and that it had violated the OMA in several ways. The trial court also granted Davis's motion for a permanent injunction barring defendants from violating the OMA. Defendants appealed (Docket No. 309218). After the trial court granted his motion for a permanent injunction, Davis filed an ex parte motion for civil contempt and order to show cause why defendants should not be held in contempt for allegedly establishing a subcommittee that would violate the trial court's earlier order. Davis distributed subpoenas to each of the team members, requiring them to appear at the show-cause hearing. Defendants moved to quash the subpoenas. Following the hearing on defendants' motion, the court ordered defendants' counsel to produce five members of the Detroit Financial Review Team at the show-cause hearing and ordered the Detroit Financial Review Team and the State Treasurer not to execute or sign a consent agreement or its equivalent with the city of Detroit, the Detroit City Council, or the Mayor of Detroit until further order of the court. Defendants filed an emergency application for leave to appeal (Docket No. 309250). By order, the Court of Appeals reversed that portion of the trial court's order that had precluded defendants from executing a consent agreement, stayed the remainder of the trial court's order, held the application for leave to appeal in abeyance, retained jurisdiction, and gave its order immediate effect. The Court of

Appeals subsequently granted defendants' application for leave to appeal, consolidated the appeals in Docket Nos. 309218 and 309250, set an expedited briefing schedule, retained jurisdiction, and again gave its order immediate effect. McNeil subsequently filed his complaint and moved for preliminary injunctive relief, alleging that the State Treasurer had been negotiating a consent agreement with the city of Detroit in violation of the OMA and that the Detroit Financial Review Team's report on the city of Detroit's finances was based on meetings that were held in violation of the OMA. The trial court issued a temporary restraining order and order to show cause, concluding that McNeil was likely to succeed on the merits of his claim that defendants had violated the OMA, and ordered a show-cause hearing concerning why the court should not grant a preliminary injunction enjoining defendants from taking any action regarding the city of Detroit in violation of the OMA. Defendants filed an emergency application for leave to appeal and application for stay (Docket No. 309482). The Court of Appeals granted the application for leave to appeal, granted the stay, consolidated the appeal with the appeals in Docket Nos. 309218 and 309250, set an expedited briefing schedule, retained jurisdiction, and again gave its order immediate effect.

The Court of Appeals *held*:

1. The OMA generally requires that the decisions and deliberations of a public body be open to the public. The OMA defines a "public body" as any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function. An individual executive acting in his or her executive capacity is not a public body for purposes of the OMA. The statutory terms used illustratively to define "public body" do not encompass individuals, and it would be beyond awkward to apply the OMA to an individual. Thus, the State Treasurer, when acting in his or her executive capacity with authority either generally derived from the Constitution or specifically derived from statute, is not a public body subject to the OMA.

2. To be a public body under the OMA, the entity at issue must be a state or local legislative or governing body that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function. That a body exercises governmental authority is not itself dispositive of whether it is a public body; the body must also be a legislative or governmental

body. Under the EFMA, under certain conditions, the State Treasurer, as the state financial authority of a municipal government, may conduct a preliminary review of a municipality's financial problems. If the State Treasurer makes a finding of probable financial stress, the Governor must appoint a financial review team for that municipal government. The Detroit Financial Review Team was a state body given that the EFMA authorized its creation and the Governor appointed the members of the team pursuant to the EFMA. However, the Detroit Financial Review Team was not empowered to make or enact law, to bring something into or out of existence by making law, or to attempt to bring about or control by legislation. And while the EFMA gives the state financial authority rulemaking authority, it does not give rulemaking authority to financial review teams. Accordingly, the Detroit Financial Review Team was not a legislative body. In determining whether a financial review team is a governing body under the OMA, a court must consider the authority or function which the EFMA empowers a financial review team to exercise or perform. Under the EFMA, a financial review team is empowered to examine the books and records of the local government, use services of other state agencies and employees, negotiate and sign a consent agreement with the chief administrative officer of the local government if approved by resolution of the governing body of the local government and approved and executed by the State Treasurer acting as the state financial authority for a municipal government, meet with the local government and receive, discuss, and consider information provided by the local government concerning the financial condition of the local government, and report its findings to the Governor, with a copy to the state financial authority; the report must include the existence, or an indication of the likely occurrence, of criteria relating to the financial condition of a local government, and the report must include one of four conclusions concerning the financial conditions of the local government. A financial review team may also appoint an individual or firm to carry out the review and submit a report to the review team for approval with the approval of the state financial authority, issue subpoenas and administer oaths to certain enumerated individuals and entities under certain circumstances, and file an action in a circuit court to compel testimony and the furnishing of records and documents under certain circumstances. To be a governing body under the OMA, an entity must be self-governing or independent, in that it makes or administers public policy for a political unit or exercises independent authority, and it must have the power to make decisions, which the OMA defines as a determination, action, vote, or disposition upon a

motion, proposal, recommendation, resolution, order, ordinance, bill or measure by which a public body effectuates or formulates public policy. The authority and functions of a financial review team under the EFMA do not empower it to independently govern through decision-making that effectuates or formulates public policy. While a financial review team may make recommendations, it does not act upon those recommendations. Accordingly, a financial review team is not a legislative or governing body and, therefore, is not a public body under the OMA.

3. A public body may not delegate its authority to subunits of individual members in order to evade the OMA. However, given that the Detroit Financial Review Team was not itself a public body, the State Treasurer, even if he acted as a one-man committee of that financial review team, was not a public body exercising governmental authority and, thus, was not subject to the strictures of the OMA.

4. Declaratory relief normally will suffice to induce the legislative and executive branches to conform their actions to constitutional requirements or confine them within constitutional limits. Only when declaratory relief has failed should the courts even begin to consider additional forms of relief, such as injunctive relief. An injunction represents an extraordinary and drastic use of judicial power that should be employed sparingly. In determining whether to issue an injunction, a court should consider: (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. Because there was no likelihood that plaintiffs would prevail on the merits, no showing of irreparable harm, and no showing that declaratory relief had failed, the trial court improperly granted injunctive relief in these cases.

5. A party to litigation must obey an order entered by a court with proper jurisdiction even if the order is clearly incorrect. Accordingly, the Detroit Financial Review Team was required to obey the trial court's orders requiring it to adhere to the OMA as long as those orders remained in effect and had not been stayed or reversed on appeal. Thus, remand for further proceedings regarding possible civil contempt by defendants was required.

Trial court rulings issuing injunctive relief reversed; both cases remanded to the trial court for entry of judgment in defendants' favor on the merits of the OMA claims brought by Davis and

McNeil; *Davis* also remanded for an evidentiary hearing on Davis's allegations that various state officials and members of the Detroit Financial Review Team were in contempt of court.

O'CONNELL, J., concurring in part and dissenting in part, concurred with the majority that the Detroit Financial Review Team was not subject to the OMA and that the Governor and State Treasurer, being individual executive branch officeholders, were not subject to the strictures of the OMA in these cases, but wrote separately to emphasize that an injunction against a coequal branch of government should be an extremely rare remedy, available only after a party has definitively established that a declaratory judgment has been ineffective, and that our governmental system turns on a respectful balance of power among the three branches of government. These tenets precluded remand, and Judge O'CONNELL accordingly would have reversed all of the trial court's rulings in their entirety.

1. STATUTES — OPEN MEETINGS ACT — PUBLIC BODIES — INDIVIDUAL EXECUTIVES — STATE TREASURER.

The Open Meetings Act (OMA) defines a "public body" as any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; an individual executive acting in his or her executive capacity is not a public body for purposes of the OMA; thus, the State Treasurer, when acting in his or her executive capacity with authority either generally derived from the Constitution or specifically derived from statute, is not a public body under the OMA (MCL 15.262[a]).

2. STATUTES — OPEN MEETINGS ACT — PUBLIC BODIES — FINANCIAL REVIEW TEAMS.

To be a public body under the Open Meetings Act (OMA), the entity at issue must be a state or local legislative or governing body that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; that an entity exercises governmental authority is not itself dispositive of whether it is a public body; the entity must also be a legislative or governing body; a financial review team appointed under the Local Government and School District Fiscal Accountability Act is not a legislative or governing body and, therefore, is not a public body under the OMA (MCL 15.261 *et seq*., MCL 141.1501 *et seq*.).

3. DECLARATORY JUDGMENTS — LEGISLATIVE AND EXECUTIVE BRANCHES OF GOVERNMENT — INJUNCTIVE RELIEF.

Declaratory relief normally will suffice to induce the legislative and executive branches to conform their actions to constitutional requirements or confine them within constitutional limits; only when declaratory relief has failed should the courts even begin to consider additional forms of relief, such as injunctive relief.

4. INJUNCTIONS — STANDARD.

An injunction represents an extraordinary and drastic use of judicial power that should be employed sparingly; in determining whether to issue an injunction, a court should consider: (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Andrew A. Paterson and *Carl J. Marlinga* for Robert Davis.

Miller Cohen, P.L.C. (by *Richard G. Mack, Jr.*, *Robert D. Fetter*, and *Keith D. Flynn*), for Edward McNeil.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Michelle M. Brya*, Assistant Attorney General, for the City of Detroit Financial Review Team, the Governor, and the State Treasurer.

Before: WHITBECK, P.J., and O'CONNELL and M. J. KELLY, JJ.

WHITBECK, P.J. These consolidated appeals involve the relationship between the Open Meetings Act[1] and the Local Government and School District Fiscal Account-

[1] MCL 15.261 *et seq*.

ability Act,[2] commonly known as the emergency financial manager act. The central issue in these cases is whether a financial review team that the Governor appoints under § 12(3) of the emergency financial manager act[3] is a "public body," as § 2(a) of the Open Meetings Act[4] defines that term. We conclude that a financial review team—and therefore the Detroit Financial Review Team—is not a public body, because it is not a "governing body" as the Open Meetings Act uses that term. And we therefore also conclude that the State Treasurer, whether acting in his executive capacity or as a "one man committee" of the Detroit Financial Review Team, is not a "public body."

We further conclude that the trial court abused its discretion by granting injunctive relief through its various rulings and orders in the proceedings below, in two major ways. First, the trial court failed to apply controlling legal principles in determining that the Detroit Financial Review Team was a public body. Second, the trial court erred by finding that there would be *per se* irreparable harm to the people if it did not grant injunctive relief.

Thus, in *Davis v Detroit Financial Review Team* (Docket No. 309218), we reverse the trial court's orders granting declaratory and injunctive relief to Davis and remand the case to the trial court for entry of judgment in favor of defendants regarding the merits of the case. Similarly, in *McNeil v Detroit Financial Review Team* (Docket No. 309482), we reverse the trial court's order granting a show-cause hearing concerning McNeil's claim under the Open Meetings Act and remand for entry of judgment in favor of defendants. However, in

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[2] MCL 141.1501 *et seq*.

[3] MCL 141.1512(3).

[4] MCL 15.262(a).

Davis v Detroit Financial Review Team (Docket No. 309250), we remand the case for further proceedings regarding Davis's motion for civil contempt.

I. BASIC FACTS

A. THE EMERGENCY FINANCIAL MANAGER ACT

The emergency financial manager act became effective March 16, 2011.[5] The emergency financial manager act provides that, when certain conditions are met, the State Treasurer, as the "state financial authority" of a municipal government, may conduct a preliminary review of a municipality's financial problems.[6]

If the State Treasurer makes a finding of "probable financial stress," the Governor must appoint a review team for that municipal government.[7] The review team for a municipal government must include the State Treasurer or his or her designee; the Director of the Department of Technology, Management, and Budget or his or her designee; a nominee of the Senate Majority Leader; and a nominee of the Speaker of the House of Representatives.[8] But the Governor may also appoint other state officials or "other persons with relevant professional experience to serve on a review team to undertake a municipal financial management review."[9]

Under the emergency financial manager act, the review team has the power to examine the books and records of the local government, utilize the services of other state agencies and employees, and negotiate and

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[5] MCL 141.1501 *et seq*. This act is also sometimes referred to as "Act 4" because of its public act number, that is, 2011 PA 4.

[6] MCL 141.1505(k)(*i*); MCL 141.1512(1).

[7] MCL 141.1512(3).

[8] *Id*.

[9] *Id.*

sign a consent agreement with the chief administrative officer of the local government.[10] However, for such a consent agreement with a municipal government to go into effect, it must be approved by resolution of the governing body of the local government and be approved and executed by the State Treasurer.[11]

Importantly, the review team must meet with the local government as part of its review.[12] At this meeting or meetings, the review team is to receive, discuss, and consider information provided by the local government concerning the financial condition of the local government.[13] The review team must report its findings to the Governor within 60 days following its appointment, although the Governor may grant one 30-day extension to this limit.[14] Within 10 days after receipt of the report of the review team, the Governor must make a determination whether a financial emergency exists and how to proceed.[15] A financial emergency can be resolved either through a consent agreement or the appointment of an emergency manager.[16]

B. OPEN MEETINGS ACT

The Open Meetings Act[17] generally requires "decisions" or "deliberations" of a "public body" to be open to the public.[18] The Open Meetings Act allows individu-

[10] MCL 141.1513(1).

[11] MCL 141.1513(1)(c).

[12] MCL 141.1513(2).

[13] *Id*.

[14] MCL 141.1513(3).

[15] MCL 141.1515.

[16] *Id*.

[17] MCL 15.261 *et seq*.

[18] MCL 15.262; MCL 15.263.

als to bring civil actions for injunctive relief to either compel compliance or enjoin further noncompliance.[19]

The Open Meetings Act defines the term "public body" for its purposes to include

> any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function . . . .[20]

The Open Meetings Act defines a "meeting," in part, as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy . . . ."[21] And the Open Meetings Act defines a "decision" as a "determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy."[22]

C. DOCKET NO. 309218

On December 21, 2011, State Treasurer Andy Dillon provided Governor Rick Snyder with a preliminary review, concluding that probable financial stress existed in the city of Detroit. On December 27, 2011, the Governor appointed the Detroit Financial Review Team. The Governor subsequently granted the financial review team a 30-day extension.

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[19] MCL 15.271.

[20] MCL 15.262(a).

[21] MCL 15.262(b).

[22] MCL 15.262(d).

On February 1, 2012, Robert Davis filed a complaint in the Ingham Circuit Court, seeking a declaratory judgment and injunctive relief based on his assertions that defendants—the Detroit Financial Review Team, the Governor, and the State Treasurer—had violated multiple provisions of the Open Meetings Act. Davis later filed an emergency motion for declaratory judgment and injunctive relief, and defendants moved for summary disposition. The trial court heard arguments on February 6 and February 15, 2012, and made rulings from the bench that it incorporated into two orders, one that it issued on February 6, 2012, and the other that it issued on February 29, 2012.

In the February 29, 2012 order, the trial court granted Davis's motion for declaratory judgment, denied defendants' motion for summary disposition, and granted Davis's motion for a permanent injunction barring defendants from violating any and all provisions of the Open Meetings Act. The trial court also held that the Detroit Financial Review Team was a public body subject to the provisions of the Open Meetings Act and that the Detroit Financial Review Team had violated the act by (1) failing to hold its January 10, 2012, meeting in public, (2) failing to keep minutes of the January 10, 2012, meeting and failing to provide Davis with a copy of the minutes, (3) failing to post notice of the January 10, 2012, meeting, and (4) meeting in closed session for impermissible purposes on January 10, 2012.

The trial court further held that the Detroit Financial Review Team violated the Open Meetings Act by holding a private meeting with the Detroit Mayor and other city officials and by meeting in closed session on January 17, 2012. The trial court awarded costs and attorney fees to Davis. The trial court dismissed the

matter with prejudice and retained jurisdiction only for the purpose of enforcement. The trial court denied defendants' motion for a stay of proceedings and closed the case.

On March 21, 2012, defendants filed a claim of appeal from the trial court's February 29, 2012, order. Defendants have subsequently stated that, although they dispute the correctness of the trial court's decision, they have conducted subsequent meetings of the Detroit Financial Review Team in conformance with the Open Meetings Act.

D. DOCKET NO. 309250

On March 1, 2012, Davis filed in the trial court an ex parte motion for civil contempt and order to show cause why defendants should not be held in contempt for establishing a subcommittee that would violate the trial court's February 29, 2012, order. The trial court issued a show-cause order on March 1, 2012, requiring all 10 members of the Detroit Financial Review Team to appear for a show-cause hearing on March 12, 2012. Defendants moved for reconsideration of that order. They asserted that the subcommittee had yet to meet and that advisory committee meetings do not violate the Open Meetings Act. In two orders issued March 8, 2012, the trial court adjourned the show-cause hearing and denied defendants' motion for reconsideration.

On March 9, 2012, Davis noticed a show-cause hearing in the trial court, supported by affidavits from him and his counsel, indicating that there were additional questions that defendants had not answered. On March 13, 2012, the trial court scheduled the show-cause hearing for March 22, 2012. Defendants assert that the trial court directed Davis's counsel to provide defendants' counsel with a list of witnesses that he

wished to present at the March 22, 2012, hearing. However, at a March 13, 2012, public meeting of the Detroit Financial Review Team, Davis's counsel distributed subpoenas to each of the team members, requiring them to appear at the show-cause hearing.

Defendants filed an emergency motion in the trial court to quash the subpoenas and to hold Davis's counsel in contempt for failing to follow the trial court's direction concerning witnesses. The trial court held a hearing on the motion on March 20, 2012. At the hearing, Davis represented that defendants continued to violate the Open Meetings Act when the State Treasurer allegedly met individually with Detroit City Council members and the Mayor's staff, allegedly exchanged drafts of documents, and allegedly negotiated for the Detroit Financial Review Team. Davis asserted that the State Treasurer acted as a member of the Detroit Financial Review Team and that he was in contempt of court.

The trial court indicated that, at a prior hearing, it had informed the parties that the appointment of a subcommittee to do the job of the Detroit Financial Review Team would be a violation of the Open Meetings Act. The trial court further stated that it would not allow the Detroit Financial Review Team to approve any agreement until the trial court was satisfied that there was proper adherence to the Open Meetings Act.

After the hearing, the trial court issued its March 20, 2012, order. In that order, the trial court adjourned the show-cause hearing to March 29, 2012, and ordered defendants' counsel to produce five members of the Detroit Financial Review Team (including the State Treasurer) to provide testimony at the show-cause hearing. The trial court further ordered the Detroit Financial Review Team and the State Treasurer not to

execute or sign a consent agreement or its equivalent with the city of Detroit, Detroit City Council, or the Mayor of Detroit until further order of the trial court. The March 20, 2012, order also required the parties to provide each other with any additional witnesses they intended to call and for the State Treasurer to produce all documents requested in Davis's subpoena, unless previously supplied. On March 22, 2012, the trial court denied defendants' emergency motion for stay. On the same day, defendants filed their emergency application for leave to appeal with this Court.

On March 22, 2012, this Court issued its order granting defendants' motion for immediate consideration, holding the application for leave and the motion for stay in abeyance, and requiring Davis to file responsive pleadings. After Davis filed his responsive pleadings, on March 23, 2012, this Court issued its order, reversing that part of the trial court's order of March 20, 2012, that precluded defendants from executing a consent agreement. This Court held that § 10 of the Open Meetings Act[23] did not authorize the trial court to bar further actions by the defendants in the absence of a finding of continued violations of the act. This Court also stayed all other aspects of the trial court's March 20, 2012, order, held defendants' application for leave in abeyance, retained jurisdiction, and gave the order immediate effect.

On March 27, 2012, this Court issued its order granting defendants' application for leave to appeal, consolidating Docket No. 309250 with Docket No. 309218, setting an expedited briefing schedule, continuing to retain jurisdiction, and giving the order immediate effect.

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[23] MCL 15.270.

On March 29, 2012, Edward McNeil filed a complaint and motion for preliminary injunctive relief against the same defendants as in the *Davis* litigation (Docket Nos. 309250 and 309218) previously described. The complaint alleged that the Detroit Financial Review Team, specifically the State Treasurer, had been negotiating a consent agreement in violation of the Open Meetings Act and that the Detroit Financial Review Team's report was based on meetings that were held in violation of the Open Meetings Act. McNeil sought a temporary restraining order prohibiting defendants from taking any further actions under the emergency financial manager act and from acting on the Detroit Financial Review Team's March 26, 2012, report.

On March 30, 2012, the trial court, without hearing from defendants, issued a temporary restraining order and order to show cause, which found, among other things, that McNeil was likely to succeed on the merits of the claims that defendants had violated the Open Meetings Act. Somewhat confusingly, the trial court also ordered that McNeil's motion for a temporary restraining order and order to show case be "held in abeyance" because McNeil was entitled to a hearing on that motion. The trial court ordered that a show-cause hearing take place on April 9, 2012, regarding why the trial court should not grant the preliminary injunction enjoining defendants from taking any action regarding the city of Detroit in violation of the Open Meetings Act. As of April 4, 2012, four Detroit Financial Review Team members were served with subpoenas to appear and produce documents at the April 9, 2012, show-cause hearing.

On April 4, 2012, defendants filed an emergency application for leave to appeal and application for stay

with this Court. After McNeil filed his responsive pleadings, on April 5, 2012, this Court issued its order granting the application for leave to appeal. This Court also granted the stay, consolidated this appeal with the appeals in the *Davis* litigation, set an expedited briefing schedule, retained jurisdiction, and gave the order immediate effect.

After receiving and reviewing briefs from all the parties in these consolidated appeals, this Court heard oral argument on May 4, 2012.

II. THE OPEN MEETINGS ACT AND FINANCIAL REVIEW TEAMS

A. OVERVIEW

The main thrust of the arguments of Davis and McNeil in these consolidated appeals is that the State Treasurer and the Detroit Financial Review Team, acting under the authority of the emergency financial manager act, violated the Open Meetings Act. At the core of this argument is the assertion that the State Treasurer and the Detroit Financial Review Team are "public bodies" subject to the Open Meetings Act.[24] Although complex, this is a narrow question. We therefore do not address the question whether the emergency financial manager act is sound public policy, either in the short term or in the long term. Such public policy matters are for the Legislature, and not this Court, to decide.[25] We also do not address the question whether the consent agreement/financial stability agreement that was ultimately entered into was a good idea or a

[24] MCL 15.262(a).

[25] *Tyler v Livonia Pub Schs*, 459 Mich 382, 393 n 10; 590 NW2d 560 (1999) ("Our role as members of the judiciary is not to determine whether there is a 'more proper way,' that is, to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature. It is the Legislature, not we, who are the people's representatives and authorized to decide public policy matters such as this.").

bad idea. And, in particular, we do not address the assertion that a financial review team acting under the authority of the emergency financial manager act *should* be subject to the Open Meetings Act and therefore *should* hold its meetings in public. We only address the question whether the Open Meetings Act *requires* that such a financial review team hold its meetings in public. In short, we deal not with what *should be*, but with what *is*.

As we outline later in this opinion, we conclude that the meetings of a financial review team—and therefore the Detroit Financial Review Team—are not covered by the Open Meetings Act. We hold that such a financial review team is not a "governing body" and, therefore, not a "public body" as the Open Meetings Act uses these terms. We reach that decision because we conclude, after examining the authority and functions of a financial review team and analyzing them within the framework of the Open Meetings Act, that the emergency financial manager act does not empower a financial review team (1) as a "governing body" (2) to exercise independent governmental or proprietary authority or (3) to perform an independent governmental or proprietary function, (4) either one of which results in independent decision-making that effectuates or formulates public policy. We also hold that the State Treasurer, whether acting in his executive capacity or as a "one man committee" of the Detroit Financial Review Team, is not a "public body."

B. STANDARD OF REVIEW

This Court reviews de novo issues of statutory construction.[26] "The Legislature is presumed to have in-

[26] *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011).

tended the meaning it has plainly expressed,"[27] and clear statutory language must be enforced as written.[28] However, when a statute is ambiguous, "this Court's goal is to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished."[29]

C. THE STATE TREASURER AS A "PUBLIC BODY"

1. PRELIMINARY MATTERS

Davis and McNeil sued the State Treasurer in his official capacity as the duly appointed Treasurer for the State of Michigan and in his official capacity as a member of the Detroit Financial Review Team. Davis and McNeil have also asserted that the State Treasurer acted as a "one man committee" in this matter. We will consider each allegation in turn.

It is appropriate to note that Davis and McNeil also sued the Governor in somewhat the same fashion. But on appeal, Davis and McNeil have made no further argument regarding the Governor's role in this case. A party may not leave it to this Court to discover and rationalize the basis for his or her claims,[30] nor may a party give issues cursory treatment with little or no citation of supporting authority.[31] And a party's failure to properly address the merits of an assertion constitutes abandonment of the

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[27] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007) (quotation marks and citation omitted).

[28] *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 72 (2007).

[29] *Tull v WTF, Inc*, 268 Mich App 24, 31; 706 NW2d 439 (2005).

[30] *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

[31] *In re Application of Indiana Mich Power Co*, 275 Mich App 369, 376; 738 NW2d 289 (2007).

issue.[32] We therefore hold that Davis and McNeil have abandoned any claims against the Governor.

2. THE STATE TREASURER ACTING IN HIS EXECUTIVE CAPACITY

Turning first to whether an individual acting in an executive capacity can constitute a "public body" as the Open Meetings Act defines that term, the leading case on this subject is *Herald Co v Bay City*.[33] That case involved the issue whether a city manager—a single individual—constituted a "public body" in connection with a city charter provision that provided for the city commission to appoint a new fire chief on the recommendation of the city manager.[34] The Michigan Supreme Court observed that, as used in the Open Meetings Act, the term "public body" connotes a collective entity and that

> [t]he statutory terms used illustratively to define "public body"—"legislative body" and "governing body"—do not encompass individuals. A single individual is not commonly understood to be akin to a "board," "commission," "committee," "subcommittee," "authority," or "council"—the bodies specifically listed in the act by the Legislature.[35]

The Supreme Court went on to note that other statutes, specifically the Freedom of Information Act,[36] define public bodies in such a way as to encompass individuals.[37] The clear inference is that the Legislature

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[32] *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

[33] *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000), modified on other grounds in *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657 (2008).

[34] *Id.* at 115.

[35] *Id.* at 129-130.

[36] MCL 15.231 *et seq*.

[37] *Herald Co*, 463 Mich at 130, citing MCL 15.232(d).

deliberately chose *not* to use a definition encompassing individuals when it enacted the Open Meetings Act. Further, the Court observed that it would be "awkward, to say the least," to apply the Open Meetings Act to an individual and concluded by stating:

> Perhaps the strongest common-sense basis for concluding that an individual was not contemplated by the Legislature as a "public body" is to consider how odd a concept it would be to require an individual to "deliberate" in an open meeting. Thus, we conclude that an individual executive acting in his executive capacity is not a public body for the purposes of the [Open Meetings Act].[38]

It is plain that this analysis applies directly to the State Treasurer as an individual executive acting alone in his executive capacity. It would be beyond "awkward" to envision that the State Treasurer, while acting, for example, in his executive capacity as the "state financial authority" of a local government and conducting a preliminary review to determine the existence of a local governmental financial problem,[39] was at that moment subject to the Open Meetings Act as a "public body"[40] when conducting a "meeting" in which he, and he alone, was "deliberating toward or rendering" a "decision" on a "public policy" matter[41] that "effectuates or formulates public policy" on which "a vote by members of a public body is required . . . ."[42]

Such a tortured, and tortuous, process is clearly outside the framework of the Open Meetings Act. As the Supreme Court stated in *Herald Co*, "an individual executive acting in his executive capacity is not a public

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[38] *Herald Co*, 463 Mich at 130-131 (citations omitted).

[39] MCL 141.1512(1).

[40] MCL 15.262(a).

[41] MCL 15.262(b).

[42] MCL 15.262(d).

body for the purposes of the [Open Meetings Act]."[43] We therefore hold that the State Treasurer when acting in his executive capacity with authority either generally derived from the Constitution or specifically derived from statute is not a public body subject to the Open Meetings Act.

3. THE STATE TREASURER ACTING AS A "ONE MAN COMMITTEE" OF THE DETROIT FINANCIAL REVIEW TEAM

Davis and McNeil also assert that the State Treasurer met with various Detroit officials and other city leaders, and negotiated part or all of the consent agreement/financial stability agreement that the Detroit Financial Review Team ultimately signed in this matter. The emergency financial manager act clearly authorizes a financial review team to "[n]egotiate and sign a consent agreement with the chief administrative officer of the local government."[44] If State Treasurer Dillon was in fact a "one man committee" negotiating with Detroit officials on behalf of the Detroit Financial Review Team, this may call into play the Supreme Court's decision in *Booth Newspapers, Inc v University of Michigan Board of Regents*.[45]

In *Booth Newspapers*, the University of Michigan Board of Regents attempted to evade the requirements

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[43] *Herald Co*, 463 Mich App at 131. See also *A&E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 651; 723 NW2d 223 (2006) (stating that the chief executive officer of an airport authority was not a public body under the Open Meetings Act); *Craig v Detroit Pub Sch Chief Executive Officer*, 265 Mich App 572, 579-580; 697 NW2d 529 (2005) (stating that the chief executive officer of the Detroit Public Schools was not a public body because he was an individual acting in his official capacity).

[44] MCL 141.1513(1)(c).

[45] *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993).

of the Open Meetings Act. Among other things, it entrusted one regent with the authority to make the "first cut" in the candidate list for the position of president of the university.[46] As the majority in *Booth Newspapers* elaborated:

> The Presidential Selection Committee [consisting of the eight-member Board of Regents] entrusted Regent [Paul W.] Brown with sole authority to make the first cut, and he did so after numerous telephone calls and meetings with the advisory committees and informal subquorum groups of regents. The acknowledged purpose of the telephone calls and subquorum meetings was to achieve the same intercommunication that could have been achieved in a full board meeting. During this process, the board avoided quorum meetings because it would have been required to conduct a public meeting under the [Open Meetings Act].[47]

The board of regents argued that Regent Brown's actions did not constitute that of a subcommittee. Therefore, the board asserted, his actions fell outside the reach of the Open Meetings Act.[48] The majority in *Booth Newspapers* did not find this argument persuasive and was concerned that it carried with it the potential for undermining the Open Meetings Act.[49] The majority stated:

> Essentially, the board argues form over substance. The Legislature did not grant any exception to specific types or forms of committees. Therefore, delegating the task of choosing a public university president to a one-man committee, such as Regent Brown, would warrant the finding that this one-man task force was in fact a public body. As the *Goode* Court observed, "[w]e do not find the question of

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[46] *Id.* at 216.

[47] *Id.*

[48] *Id.* at 225-226.

[49] *Id.* at 226.

> whether a multi-member panel or a single person presides to be dispositive. Such a distinction carries with it the potential for undermining the Open Meetings Act . . . ."[50]

The majority went on to hold that the "selection of a public university president constitutes the exercise of government authority, regardless of whether such authority was exercised by Regent Brown, the nominating committee, the full board, or even subcommittees."[51] Accordingly, the majority held that this "individual," referring to Regent Brown, or these entities must be deemed to be public bodies within the scope of the Open Meetings Act.[52]

But, importantly, in *Herald Co* the Supreme Court later explained that the individual member of the public body in *Booth Newspapers*—Regent Brown—was distinguishable from an individual executive. The majority in *Herald Co* explained that, in *Booth Newspapers*, there was a public body in the first instance—the board of regents—that impermissibly attempted to delegate its authority to subunits of individual members in an attempt to evade the Open Meetings Act.[53] Thus, the question of whether the State Treasurer acted as a "one man committee" of the Detroit Financial Review Team when he allegedly met with various Detroit officials and leaders and negotiated part or all of the consent agreement/financial stability agreement, turns on whether the Detroit Financial Review Team itself is a public body under the Open Meetings Act. If the Detroit Financial Review Team is not itself a public body, then the State Treasurer, as a "one man committee" of that financial review team, could not himself be a public body under

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[50] *Id.*, quoting *Goode v Dep't of Social Servs*, 143 Mich App 756, 759; 373 NW2d 210 (1985) (alteration in original).

[51] *Booth Newspapers*, 444 Mich at 226.

[52] *Id.*

[53] *Herald Co*, 463 Mich at 135 n 18.

the Open Meetings Act. We thus turn to the question of whether the Detroit Financial Review Team is a public body within the meaning of the Open Meetings Act.[54]

D. A FINANCIAL REVIEW TEAM AS A "PUBLIC BODY"

1. THE STATUTORY REQUIREMENTS ACCORDING TO *HERALD CO*

As outlined in *Herald Co*, the definition of a "public body" in the Open Meetings Act contains two requirements.[55] "First, the entity at issue must be a 'state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council.' "[56] Second, the entity must be "empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or propriety authority or perform a governmental or proprietary function[.]"[57]

2. THE DETROIT FINANCIAL REVIEW TEAM AS A LEGISLATIVE BODY

It is clear that the Detroit Financial Review Team is a state body. The emergency financial manager act authorized the creation of financial review teams and the Governor appointed the members of the Detroit Financial Review Team pursuant to that act.[58] But it is equally clear that a financial review team is not a legislative body.

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[54] For the sake of clarity, we note that in its final order granting declaratory and injunctive relief to Davis, the trial court only held the Detroit Financial Review Team to constitute a public body under the Open Meetings Act. However, McNeil asserted in his complaint that all defendants are public bodies under the Open Meetings Act. Thus, the question of whether the State Treasurer is a public body under the Open Meetings Act is within the scope of issues in controversy in McNeil's case.

[55] *Id.* at 129.

[56] *Id.*, quoting MCL 15.262(a).

[57] MCL 15.262(a); see also *Herald Co*, 463 Mich at 129.

[58] See MCL 141.1512(3).

The Open Meetings Act does not define the term "legislative body." But when a statute does not define words contained within it, we must construe and understand them according to the common and approved usage of the language.[59] And to determine the common, ordinary meaning, courts may consult dictionary definitions.[60] Further, "[t]his Court must avoid a construction that would render any part of a statute surplusage or nugatory," and " '[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.' "[61]

Near the time of the enactment of the Open Meetings Act, the *American Heritage Dictionary of the English Language*, *New College Edition* defined the word "legislative" as "[h]aving the power to create laws; designed to *legislate*."[62] In turn, that dictionary defined "legislate" as "[t]o pass a law or laws" or "[t]o create or bring about by legislation; enact into law."[63] Similarly, the *Random House Webster's College Dictionary* defines "legislative" as "**1.** having the function of making laws: *a legislative body*. **2.** of or pertaining to the enactment of laws: *legislative proceedings*. **3.** pertaining to a legislature: *a legislative recess*."[64] The same dictionary defines "legislate" as "to make or enact laws."[65] And *A Dictionary of Modern Legal Usage* defines "legislate" as

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[59] MCL 8.3a.

[60] *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006); *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004).

[61] *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010) (dealing with initiated laws) (citation omitted; alteration in original).

[62] *American Heritage Dictionary of the English Language*, *New College Edition* (1978) (emphasis added).

[63] *Id.*

[64] *Random House Webster's College Dictionary* (1997).

[65] *Id.*

"to make laws; . . . to bring (something) into or out of existence by making laws; to (attempt to) bring about or control by legislation."[66]

The emergency financial manager act does not give a financial review team the power to make or enact law, to bring something into or out of existence by making law, or to attempt to bring about or control by legislation. Therefore, a financial review team cannot legislate and it has no legislative functions. And while the emergency financial manager act gives the state financial authority (that is, in the case of a municipal government, the State Treasurer) rulemaking authority,[67] it gives no such authority to a financial review team. Accordingly, we conclude that the Detroit Financial Review Team is not a legislative body.

3. THE DETROIT FINANCIAL REVIEW TEAM AS A GOVERNING BODY

The question whether the Detroit Financial Review Team is a "governing body" is more complex. Again, the Open Meetings Act does not define the term "governing body," but, as defendants point out, *The American Heritage Dictionary of the English Language*, *New College Edition*, defines "govern" as "[t]o make and administer public policy" for a political unit and to "exercise sovereign authority in."[68] Similarly, the first *Random House Webster's College Dictionary* definition for "govern" is "to rule by right of authority, as a sovereign does: *to govern a nation.*"[69] *A Dictionary of Modern American Usage*

[66] Garner, *A Dictionary of Modern Legal Usage* (2d ed) (New York: Oxford University Press, 1995).

[67] MCL 141.1529.

[68] *American Heritage Dictionary of the English Language*, *New College Edition* (1978).

[69] *Random House Webster's College Dictionary* (1997).

equates "governing" with regulating and controlling.[70] Further, the Legislature has elsewhere defined "governing body" to mean a body that has some specific authority over a political subdivision: a board of commissioners for a county, a city or village council, a township board, a body with legislative powers, or any body that has general governing or policymaking authority over a political subdivision.[71]

It is also instructive to examine the entire context of the Open Meetings Act to determine the Legislature's intent when it used the term "governing body."[72] Within the definition of "public body" is the added provision that the state or local legislative or governing body must be empowered by state constitution, statute, charter, ordinance, resolution, or rule to "exercise governmental or proprietary authority or perform a governmental or proprietary function[.]"[73] As a consequence, in the case of the provisions of the emergency financial manager act, we must look to the "authority" or "function" that the act empowers a financial review team to exercise or perform. And, as Davis points out, the focus of our inquiry is the "authority *delegated* to [the financial review team], not the authority it *exercised*."[74]

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[70] Garner, *A Dictionary of Modern American Usage* (New York: Oxford University Press, 1998).

[71] See, for example, MCL 45.582(d); MCL 120.102(c) and (d); MCL 123.731(k); MCL 124.112(b); MCL 124.301(f); MCL 124.531(a); MCL 125.651(d); and MCL 125.1603(c). See *Louis A Demute, Inc v Employment Security Comm*, 339 Mich 713, 721-722; 64 NW2d 545 (1954) (indicating that, although not determinative, the terms of one statute may be taken as a factor in determining the interpretation of another statute).

[72] *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001) ("We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.").

[73] MCL 15.262(a).

[74] *Schmiedicke v Clare Sch Bd*, 228 Mich App 259, 264; 577 NW2d 706 (1998).

Section 12(3)[75] of the emergency financial manager act sets out the process by which the Governor may appoint a financial review team, but it is § 13 of that act that generally delineates a financial review team's authority and functions.[76] Indeed, MCL 141.1513 states unequivocally that

> [t]he review team shall have the full power in its review to perform all of the following *functions*:
>
> (a) Examine the books and records of the local government.
>
> (b) Utilize the services of other state agencies and employees.
>
> (c) Negotiate and sign a consent agreement with the chief administrative officer of the local government. . . . In order for the consent agreement to go into effect, it shall be approved, by resolution, by the governing body of the local government and shall be approved and executed by the state financial authority. . . .
>
> (2) The review team shall meet with the local government as part of its review. At this meeting, the review team shall receive, discuss, and consider information provided by the local government concerning the financial condition of the local government.
>
> (3) The review team shall report its findings to the governor, with a copy to the state financial authority . . . .

The report given to the Governor must include "the existence, or an indication of the likely occurrence of," a number of criteria relating to the financial condition of a local government.[77] In its report, a review team must include one of four conclusions concerning the financial condition of the local government.[78] The second per-

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[75] MCL 141.1512(3).

[76] MCL 141.1513.

[77] MCL 141.1513(3).

[78] MCL 141.1513(4).

missible conclusion is that the local government is "in a condition of severe financial stress . . . , but a consent agreement containing a plan to resolve the problem has been adopted . . . ."[79]

In addition, a financial review team is empowered, with the approval of the State Treasurer as the state financial authority, to "appoint an individual or firm to carry out the review and submit a report to the review team for approval."[80] And, as Davis and McNeil point out, a financial review team has the power, under certain circumstances, to issue subpoenas and administer oaths to certain enumerated individuals and entities.[81] Further, a financial review team, under certain circumstances, may file an action in a circuit court to compel testimony and the furnishing of records and documents.[82]

In arguing that a financial review team is not a governing body, defendants place considerable emphasis on *The American Heritage Dictionary*'s use of the words "sovereign authority." The Attorney General couples these words with the definition in *The American Heritage Dictionary of the English Language*, *New College Edition* of the word "sovereign" as meaning "[h]aving supreme rank or power" or "[s]elf-governing; independent[.]"[83] Accordingly, defendants assert that a governing body "is a body that makes or administers public policy for a political unit or exercises supreme or independent authority."

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[79] MCL 141.1513(4)(b).

[80] MCL 141.1513(5).

[81] MCL 141.1526(1).

[82] *Id*.

[83] *The American Heritage Dictionary of the English Language*, *New College Edition* (1978).

To the extent that defendants describe a public body's authority as "supreme," we find that definition to be overstated and therefore, paradoxically, too narrow. In our view, the question is not whether a financial review team exercises "supreme" sovereign authority in the manner of the early English kings or the Russian czars. In Michigan's constitutional democracy with, at the state level, three coequal branches of government exercising checks and balances on one another, together with various local governmental entities exercising various responsibilities, it is the rare individual or entity indeed that exercises "supreme" and unchecked authority. Defendants' definition would winnow the number of public bodies in this state down to a precious few. And we do not believe that the Legislature intended such a constricted definition.

However, we do accept defendants' definition to the extent that a governing body should be one that is "[s]elf-governing; independent";[84] that is, a body that makes or administers public policy for a political unit or exercises independent authority. And concomitant with that independent authority is the power of that governing body to make decisions, which the Open Meetings Act defines as a "determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill or measure . . . by which a public body effectuates or formulates public policy."[85]

Davis and McNeil, on the other hand, appear to argue that we should consider *any* state or local body empowered by law to exercise governmental or proprietary authority or perform a governmental or proprietary function to be a public body under the Open Meetings

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[84] *The American Heritage Dictionary of the English Language*, *New College Edition* (1978).

[85] MCL 15.262(d) (emphasis added).

Act. Indeed, Davis asserts that in *Booth Newspapers* the Supreme Court "clarified" that a public body does not have to be a legislative or governing body.

But *Booth Newspapers* actually says no such thing. Rather, *Booth Newspapers* stated that "*a* key determination of the [Open Meetings Act's] applicability is whether the body in question exercises governmental or proprietary authority."[86] The Supreme Court obviously did not read the words "legislative or governing body" out of the Open Meetings Act when it decided *Booth Newspapers*. To do so now would be to render the statutory language nugatory.[87] As previously set forth, § 2(a) of the Open Meetings Act defines a public body in relevant part to be "any state or local legislative or governing body," including certain enumerated examples, that is empowered by various sources of law "to exercise governmental or proprietary authority or perform a governmental or proprietary function[.]"[88]

Treating *any* state or local body that is empowered by law to exercise governmental or proprietary authority or perform a governmental or proprietary function as a public body under the Open Meetings Act would improperly render nugatory the Legislature's use of the adjective "governing" to *limit* the types of bodies that are public bodies subject to the Open Meetings Act. By identifying whether the body in question exercises governmental or proprietary authority as *a* key determination under the Open Meetings Act, the Supreme Court did not say, nor can it reasonably be inferred, that this was the *only*

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[86] *Booth Newspapers*, 444 Mich at 225 (emphasis added), citing *Goode*, 143 Mich App at 759 ("The dispositive question is whether the performance of necessary governmental functions is open to the public.").

[87] *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007) ("[A] reviewing court should not interpret a statute in such a manner as to render it nugatory.").

[88] MCL 15.262(a).

determination to be made under the act. As defendants point out, the fact that a body exercises governmental authority is not itself dispositive. The body must also be a legislative or governing body.[89]

This Court's opinion in *Crowley v Governor*[90] makes it clear that not all governmental bodies empowered to exercise a governmental function are public bodies within the meaning of the Open Meetings Act. *Crowley* involved the question whether the Legislative Leadership Committee, which consisted of four leading members of the Legislature, was a public body under the Open Meetings Act and thus had violated the act by convening a special session of the Legislature without complying with the act.[91] This Court agreed with the defendants in *Crowley* that the Legislative Leadership Committee was not a public body because it did not "legislate" or "govern," emphasizing that the authority of the committee "amount[ed] to the sole administrative task of reconvening the Legislature in the case of an emergency."[92] Because the Legislative Leadership Committee was plainly a committee that exercised a governmental function in reconvening the Legislature, it is inherent in the holding in *Crowley* that not *every* governmental committee charged with exercising a governmental function is a public body under the Open Meetings Act.[93]

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[89] *Herald Co*, 463 Mich App at 132, n 15 (stating that establishing the second requirement—governmental authority—does not establish the first requirement—that the entity is a legislative or governing body).

[90] *Crowley v Governor*, 167 Mich App 539; 423 NW2d 258 (1988).

[91] *Id*. at 541-542.

[92] *Id*. at 545-546.

[93] See also *Herald Co*, 463 Mich at 136 n 19 (concluding that a purely advisory body that did not derive its power from state constitution, statute, charter, ordinance, resolution, or rule was not subject to the Open Meetings Act).

In our view, the question is whether, looking at the four corners of the emergency financial manager act, that act empowers a financial review team (1) as a "governing body" (2) to exercise an independent governmental or proprietary authority or (3) to perform an independent governmental or proprietary function, (4) either one of which results in independent decision-making by which a financial review team effectuates or formulates public policy.

We note that, pointing to the definition of "decision," plaintiffs argue that the financial review team was involved in decision-making by making recommendations. In other words, plaintiffs contend that the act of making a recommendation alone constitutes a decision within the meaning of the Open Meetings Act's definition.[94] However, we find it significant that the definition does not merely refer to a recommendation alone. Rather, it refers to a "determination, action, vote, or disposition *upon* a motion, proposal, recommendation, resolution, order, ordinance, bill or measure"—the operative word here being "upon."

We observe that rarely do recommendations coming from a public body originate from the entire public body itself. As an example, when the State Administrative Board meets to approve contracts, the recommendation for approval comes from a committee of the board, not the board itself. Similarly, when a local city council meets to consider a budget, the recommendation for approval of the budget usually comes from the mayor, not the city council itself. In those circumstances, the public body acts "upon" a recommendation made to it by another entity, group, or person. The public body does not usually initiate or make a recommendation to itself.

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[94] MCL 15.262(d).

With this distinction in mind, we turn to the "authority" or "function" that the emergency financial manager act empowers a financial review team to exercise or perform. Consequently, we must consider § 13[95] of the emergency financial manager act, within the analytical context of the Open Meetings Act, particularly its definitional sections.[96]

a. EXAMINING THE BOOKS AND RECORDS

A financial review team's first function under § 13 is to examine the books and records of the local government.[97] This function is purely investigative in nature. And investigations do not, when standing alone, involve independent decision-making that effectuates or formulates public policy. These investigations may ultimately lead to recommendations, advice, and perhaps decisions by other entities, groups, or persons. But in no sense are such investigations "governing" by making decisions that effectuate or formulate public policy. Inherently, they do not involve determinations, actions, votes, or dispositions. While they may be governmental or proprietary in nature, their result is purely advisory.[98]

As defendants point out, perhaps the closest analogue to a financial review team under the emergency financial manager act is the Auditor General. The Auditor General and his or her staff has the authority

[95] MCL 141.1513.

[96] MCL 15.262.

[97] MCL 141.1513(1)(a).

[98] See *Herald Co*, 463 Mich at 136 n 19 (stating that a city manager's committee's duties—to aid in establishing hiring criteria, soliciting and screening applicants, interviewing applicants, and to advise on the selection of the most qualified candidate—were "purely advisory in nature"); *House Speaker v Governor*, 443 Mich 560, 594 n 40; 506 NW2d 190 (1993) (stating that the Open Meetings Act does not apply to advisory boards created by executive order to advise governmental departments).

to examine "the books, accounts, documents, records, performance activities, and financial affairs of each branch, department, office, board, commission, agency, authority, and institution of this state."[99] In doing so, individuals are required to cooperate with the audit and answer truthfully all questions related to the audit.[100] And the Auditor General and his or her appointees have the power to issues subpoenas, compel the attendance and testimony of witnesses, and administer oaths.[101] However, we have found no case in Michigan in which the Auditor General and his or her audit team has been held to be a public body.

b. UTILIZING THE SERVICES OF OTHER STATE AGENCIES AND EMPLOYEES

A financial review team is also empowered under § 13 to utilize the services of other state agencies and employees.[102] While this language rather clearly establishes that a financial review team is a state agency, this function is otherwise administrative in nature and therefore uninformative. Again, while such utilization may be governmental or proprietary in nature, it does not involve "governing" by the financial review team through independent determinations, actions, votes, or dispositions that effectuate or formulate public policy.

c. NEGOTIATING AND SIGNING A CONSENT AGREEMENT

It is a financial review team's third function under § 13—the power to negotiate and sign a consent agreement with the chief administrative officer of the local

[99] MCL 13.101(2).

[100] MCL 13.101(3).

[101] MCL 13.101(4).

[102] MCL 141.1513(1)(b).

government[103]—that is the fulcrum of this case. These actions might *appear* to be an act of "governing" by both formulating—through negotiations with the local government—and effectuating—through signing the consent agreement—public policy. However, language in the remainder of that subdivision invalidates such a conclusion. That language states that "[i]n order for the consent agreement to go into *effect*, it shall be approved, by resolution, by the governing body of the local government and shall be approved and executed by the state financial authority,"[104] here, the State Treasurer.

As a result, when we consider the entirety of this critical subdivision of the emergency financial manger act, we conclude that a consent agreement that a financial review team negotiates and signs is but the first step in the process of effectuating or formulating public policy. A financial review team is not acting "upon" a "motion, proposal, recommendation, resolution, order, ordinance, bill or measure" that has come before it.[105] Rather, it is *making* a recommendation "upon" which the governing body of the local government and the State Treasurer, acting as the state financial authority can, within the exercise of their full discretion, act.

Such a consent agreement is, until the governing body of the local government approves it and the State Treasurer approves and executes it, only a recommendation. And, in our view, a recommendation for action by *another* entity, group, or individual, by its very nature, cannot constitute "governing" either through the effectuating or the formulating of public policy by the entity that is itself making the recommendation.

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[103] MCL 141.1513(1)(c).

[104] *Id.* (emphasis added).

[105] MCL 15.262(d).

That is, even by negotiating and signing the consent agreement, the financial review team is not, and cannot be, by statute, exercising independent authority to effectuate the recommendation contained in the consent agreement.

Therefore, under the process established by the emergency financial manager act, a financial review team can only, together with the chief administrative officer of a local government, provide a *recommended* consent agreement to the governing body of the local government and the State Treasurer. The financial review team itself has no capacity to act upon this recommendation and has no power to implement it. The effectuating and formulating of public policy can only occur by and through the actions of the governing body of the local government and the State Treasurer. They, and only they, can act upon the recommended consent agreement after the financial review team forwards that recommended consent agreement for approval.

This differs critically from the acts of individual or subquorum groups of regents in *Booth Newspapers*. In that case, the individual regents or subquorum groups were not merely making recommendations. Rather, they were effectively exercising the authority of the University of Michigan Board of Regents to narrow the field of candidates and ultimately choose the person to be the university president. In contrast, a financial review team cannot exercise authority to *adopt* a consent agreement but can merely participate in preparing a *recommended* consent agreement. And, in our view, the preparation of a recommended consent agreement cannot constitute "governing" either through the effectuating or the formulating of public policy.[106]

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[106] See *Herald Co*, 463 Mich at 136 n 19; *Booth Newspapers*, 444 Mich at 240 n 8 (BOYLE, J., concurring in part and dissenting in part).

Until approved by the governing body of the local government (presumably in accordance with the Open Meetings Act), a financial review team's *recommended* consent agreement does not and cannot "govern" the actions of such a local government. And, even then, until approved and executed by the State Treasurer, it does not and cannot "govern" the actions of state government. Stated another way, until properly acted "upon"—not by the financial review team, but by the governing body of the local government and by the State Treasurer—a consent agreement that a financial review team negotiates and signs is not a contract and has no legal effect.[107]

And, as defendants point out, the functions that the emergency financial manager act empowers a financial review team to undertake do not include public policy-making with respect to a local governmental unit. While a financial review team performs its functions, local officials still govern the local governmental unit. The emergency financial manager act does not suspend or alter the authority of these officials until the Governor puts the local governmental unit into receivership and appoints an emergency financial manager.[108] At that point, an emergency financial manager, not the financial review team, assumes the powers of the local governmental unit. Thus, a financial review team has no authority under the emergency financial manager act to "govern" any local governmental unit by effectuating or formulating public policy.

We conclude therefore that the process by which a financial review team negotiates and signs a consent agreement is not "governing" through independent

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[107] See *Minock v Shortridge*, 21 Mich 304, 315 (1870) (stating that an executory contract "has no binding force until it is confirmed").

[108] MCL 141.1519(2).

decision-making that effectuates or formulates public policy. The financial review team's actions in negotiating and signing a consent agreement are not a "decision" within the meaning of the Open Meetings Act because the financial review team is not acting upon a recommendation. Rather, it is *making* a recommendation.

We further recognize that the rather intricate workings of the emergency financial manager act create a situation whereby a financial review team's decision *not* to negotiate and sign a consent agreement might be considered a "determination, action, vote, or disposition,"[109] albeit a negative one. Following a financial review team's decision not to negotiate and sign a consent agreement, the local governing body and the State Treasurer would not thereafter be able to approve and execute a consent agreement.

Rather clearly, however, the Legislature anticipated such a circumstance. Under § 15(1)[110] of the emergency financial manager act, the Governor, after receiving the required report from the financial review team under § 13(3),[111] would be required to determine either that "[t]he local government is not in a condition of severe financial stress"[112] or that "[a] local government financial emergency exists . . . and no satisfactory plan exists to resolve the emergency."[113]

Therefore, a financial review team's decision not to negotiate and sign a consent agreement would eliminate one option—the approval and execution of a consent agreement—but that decision would leave at least

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[109] See MCL 15.262(d).

[110] MCL 141.1515(1).

[111] MCL 141.1513(3).

[112] MCL 141.1515(1)(a).

[113] MCL 141.1515(1)(c).

two options open for the Governor. Thus, that decision still effectively functions as a recommendation "upon" which the Governor can act by selecting one of the remaining alternatives. In effectively recommending, but not itself acting "upon" the selection of one of these remaining alternatives, a financial review team is not itself "governing" as it is neither effectuating nor formulating public policy.

More broadly, a refusal to negotiate and sign a consent agreement is not an affirmative act of "governing." Rather, it is a *refusal* to govern, a negative act. Logically speaking, therefore, a financial review team could not be a "governing body" if it, in fact, refused to govern.

d. MEETING WITH THE LOCAL GOVERNMENT

A financial review team's fourth function under § 13 is to meet with the local government and receive, discuss, and consider information provided by the local government concerning the financial condition of the local government.[114] Again, this function is investigative in nature and is not "governing" through independent decision-making that effectuates or formulates public policy.

e. REPORTING ITS FINDINGS TO THE GOVERNOR

A financial review team's fifth function under § 13 is to report its findings to the Governor, with a copy to the State Treasurer acting as the state financial authority.[115] The report, even if it contains recommendations in addition to "findings," is purely advisory in nature

[114] MCL 141.1513(2).

[115] MCL 141.1513(3).

and cannot constitute "governing" through independent decision-making that effectuates or formulates public policy.

Again, the financial review team is not acting on these advisory recommendations as it has no power to do so. Rather, the financial review team is *making* recommendations on which others may, at their discretion, act. And a financial review team has no discretion in the matter. Section 13(3) of the emergency financial manager act states that a financial review team "*shall* report its findings to the governor" and that the findings "*shall* include the existence, or an indication of the likely occurrence," of any of a delineated set of financial conditions.[116]

f. CONCLUSION

We therefore conclude that the authority and functions of a financial review team under § 13 of the emergency financial manager act[117] do not empower a financial review team to independently govern through decision-making that effectuates or formulates public policy. A financial review team cannot act on its recommendations; it can only *make* such recommendations. As a consequence, we conclude that the Detroit Financial Review Team is not a "governing body" and, therefore, not a "public body" within the meaning of the Open Meetings Act.[118]

The fact that a financial review team can hire outside experts,[119] has the power, under certain circumstances, to issue subpoenas and administer oaths to certain

[116] MCL 141.1513(3) (emphasis added).

[117] MCL 141.1513.

[118] MCL 15.262(a).

[119] MCL 141.1513(5).

enumerated individuals and entities,[120] and can, under certain circumstances, file an action in a circuit court to compel testimony and the furnishing of records and documents[121] does not change our conclusion. These functions are ancillary to the financial review team's investigative function. Again, such functions are not "governing" because they do not involve independent decision-making that effectuates or formulates public policy.

In light of our conclusion that a financial review team is not itself a public body, we conclude that the Supreme Court's holding in *Booth Newspapers* is inapplicable here. That is, since the Detroit Financial Review Team is not itself a public body, then the State Treasurer could not himself, even if acting as a "one man committee," be a public body exercising governmental authority.

4. DELEGATION BY A PUBLIC BODY

Additionally, we note that the fact that the Governor—who is clearly not a public body—appoints the financial review team, takes this case out of the realm of cases like *Morrison v East Lansing*,[122] in which this Court held that an advisory committee appointed by the city council was a public body subject to the Open Meetings Act. The East Lansing City Council had created the Hannah Building Committee by resolution to serve as "an advisory committee to assist in the selection of architects, designers, and professional service organizations and to advise the council on programmatic needs and other issues to be decided in the

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[120] MCL 141.1526(1).

[121] *Id*.

[122] *Morrison v East Lansing*, 255 Mich App 505, 520; 660 NW2d 395 (2003).

planning process" for a community-center project.[123] This Court considered the question whether the Hannah Building Committee was a public body under the Open Meetings Act to be a "close call."[124]

But, ultimately this Court in *Morrison* concluded that the Hannah Building Committee was a public body under the Open Meetings Act, emphasizing that, unlike the advisory committee to the city manager in *Herald Co*, the Hannah Building Committee was created by the East Lansing City Council—a public body under the Open Meetings Act as a local legislative body—and that the city council "effectively authorized the [Hannah Building Committee] to perform a governmental function."[125] This Court considered the situation in *Morrison* to be more akin to the holding in *Booth Newspapers* that various bodies created by the University of Michigan Board of Regents to which the board of regents delegated authority constituted public bodies, as compared to the holding in *Herald Co* that an advisory committee to a city manager did not constitute a public body.[126]

We recognize that, under *Morrison*, an advisory committee to a public body *that is created by that public body* may itself constitute a derivative public body. But the question of a financial review team under the emergency financial manager act differs markedly from the committee at issue in *Morrison*. Unlike the Hannah Building Committee, a financial review team is not created *by* a public body to serve in an advisory role *to* a public body. Rather, as discussed previously, the emergency financial manager act provides a method for the

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[123] *Id*. at 507-508.

[124] *Id*. at 520.

[125] *Id*.

[126] *Id*. at 518-520.

Governor—who, again, is clearly not a public body—to appoint a financial review team.[127] We conclude that the holding in *Morrison*, which is rooted in the Supreme Court's earlier holding in *Booth Newspapers*, is inapplicable to a financial review team. The Governor's appointment pursuant to statute creates a financial review team. Such a financial review team is thus not created by a public body to serve it in an adjunct advisory role.

III. INJUNCTIVE RELIEF

A. OVERVIEW

We have explained our conclusion that a financial review team under the emergency financial manager act is not a "governing body" as the Open Meetings Act defines that term and, consequently, is not a "public body" subject to that act. The trial court in these consolidated appeals issued various forms of injunctive relief primarily based upon its contrary conclusion that the Detroit Financial Review Team *is* a "public body." In examining the analysis in which the trial court engaged to reach that contrary conclusion, we find that analysis to have been, at best, superficial.

The trial court appeared to be concerned mainly with its own view that, in the general scheme of things, the Open Meetings Act *ought to* cover the Detroit Financial Review Team, not whether a close reading of the text of the Open Meetings Act actually warranted a conclusion that it *does* cover the Detroit Financial Review Team. In short, the trial court concentrated on what the law *should* be, not what the law *is*. More specifically, while the trial court did appear to recognize, at least superficially, the traditional standards for injunctive relief, it essentially

[127] MCL 141.1512(3).

leapfrogged to the conclusion that the Detroit Financial Review Team was a public body and therefore that there was a substantial likelihood that Davis and McNeil would prevail on the merits of their claims. In our analysis, we have reached the exact opposite conclusion. In our view, such public policy matters are for the Legislature, and not this Court, to decide.[128]

The trial court further found that there would be irreparable harm to the public if it did not issue injunctive relief, apparently without considering whether the declarative relief contained in its various rulings and orders was sufficient under the circumstances then prevailing and under applicable precedent of this Court and the Supreme Court. We therefore conclude that the trial court's issuance of injunctive relief was contrary to controlling principles of law and an abuse of discretion.

B. STANDARD OF REVIEW

The grant or denial of a preliminary injunction is within the sound discretion of the trial court, and this Court will not reverse that decision absent an abuse of that discretion.[129] An abuse of discretion exists when the decision is outside the range of principled outcomes.[130] The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity jurisdiction and the evidence in the case.[131] An abuse of discretion may arise from the

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[128] *Tyler*, 459 Mich at 393 n 10.

[129] *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001).

[130] *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

[131] *Jeffrey v Clinton Twp*, 195 Mich App 260, 263; 489 NW2d 211 (1992).

court's misunderstanding of controlling legal principles.[132] A question of statutory interpretation is a question of law that we review de novo.[133] We review the facts on which the court relies in exercising its discretion for clear error.[134]

C. LEGAL STANDARDS

As this Court has recognized, "[a]n injunction represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity."[135] This Court has identified four factors to consider in determining whether to grant a preliminary injunction:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.[136]

Stated another way, injunctive relief " ' "is an extraor-

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[132] *East Lansing v Dep't of State Police*, 269 Mich App 333, 335; 712 NW2d 519 (2005).

[133] *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 408; 716 NW2d 236 (2006).

[134] *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America, UAW v Michigan*, 231 Mich App 549, 551; 587 NW2d 821 (1998).

[135] *Senior Accountants, Analysts & Appraisers' Ass'n v Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996).

[136] *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998); see also *Mich State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984), and *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 10-11; 753 NW2d 595 (2008) (discussing the irreparable harm portion of the analysis).

dinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." ' "[137]

Further, with respect to irreparable harm, we

> note that the Supreme Court has recently recognized that declaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to constitutional requirements or confine them within constitutional limits. Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations.[138]

D. LIKELIHOOD OF SUCCESS ON THE MERITS

1. DOCKET NO. 309218

As previously noted, on February 1, 2012, Davis filed his action in the Ingham Circuit Court seeking both declaratory and injunctive relief based upon his assertions that the Detroit Financial Review Team, the Governor, and the State Treasurer had violated multiple provisions of the Open Meetings Act. On February 6, 2012, the trial court issued its order in this case granting a preliminary injunction and denying defendants' motion for stay. The trial court granted the preliminary injunction against the Detroit Financial Review Team "for the reasons stated from the bench and incorporated herein" and denied defendants' motion for stay on the same basis. The trial court made no mention of the standards for injunctive relief in this order.

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[137] *Pontiac Fire Fighters Union*, 482 Mich at 8, quoting *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998), quoting *Jeffrey*, 195 Mich App at 263-264.

[138] *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) (quotation marks and citations omitted).

And on February 29, 2012, the trial court granted Davis's motion for a declaratory judgment, denied defendants' motion for summary disposition, and granted Davis's motion for a permanent injunction "for the reasons stated from the bench on February 6 and 15, 2012 and incorporated herein." Once again, the trial court made no mention of the standards for injunctive relief in this order.

We observe that the trial court's orders depend on the rationale that the trial court advanced in its rulings from the bench on February 6 and February 15, 2012. While the February 15 ruling made no reference to the likelihood that Davis would prevail on the merits—a critical element in determining whether to issue an injunction—the trial court did shed some light on the reasoning behind its determination that the Detroit Financial Review Team was subject to the Open Meetings Act. In particular, the trial court mentioned that a financial review team had the "power to enter into a contract," as well as the power to subpoena witnesses and the power to go to court to compel the production of documents.

In its ruling from the bench on February 6, the trial court articulated much the same rationale. After generally commenting on cases that the trial court had presided over involving advisory committees, the trial court stated that, "[v]ery importantly, [financial review teams] can negotiate and sign . . . a consent agreement with the chief administrative office of the local government." The trial court also mentioned that a financial review team has the right to examine books and records, the right to use other state agencies, the power to issue subpoenas, and the power to apply to courts to require persons to furnish answers to questions under oath. The trial court concluded, "This certainly goes far

beyond what an advisory committee, in my opinion based upon what I've seen, would do."

It is therefore clear that the trial court did in these two rulings from the bench give some indication that it had examined the functions of a financial review team under the emergency financial manager act. However, the trial court, in its various rulings and orders, never mentioned the requirements of the Open Meetings Act and the cases interpreting it.

Accordingly, the trial court gave no indication—other than to say that its enumeration of a financial review team's functions went "far beyond" those of an advisory committee—whether it considered a financial review team to be either a "legislative body" or a "governing body" as the Open Meetings Act uses those terms.[139] Nor did the trial court state that a financial review team was empowered to exercise governmental or proprietary authority or to perform a governmental or propriety function.[140] And the trial court entirely failed to consider whether a financial review team could engage in decision-making that effectuates or formulates public policy.[141] Thus, the trial court's analysis was contrary to controlling legal principles.

This lack of an Open Meetings Act analytical framework is best illustrated by the trial court's handling of a review team's power to negotiate and sign a consent agreement.[142] As we have already outlined, this power is at the very center of this case, and we agree with the trial court that it is therefore important. The trial court necessarily had to conclude, although it did not articu-

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[139] See MCL 15.262(a).

[140] *Id*.

[141] *Id*.

[142] MCL 141.1513(1)(c).

late this conclusion, that this power involves the authority to make a "decision" under the Open Meetings Act.

But a financial review team does not have such authority. As we have said, a consent agreement that a financial review team negotiates and signs is but the first step in the process of effectuating or formulating public policy. It is, until the governing body of the local government approves it and the State Treasurer approves and executes it, only a recommendation. And making a recommendation does not constitute "governing" either through the effectuating or the formulating of public policy. As we have outlined, a review team is not acting upon a recommendation when it negotiates and signs a consent agreement. Rather, it is *making* such a recommendation to the local governing body and to the State Treasurer.

In this respect, as well as with respect to the other powers of a financial review team that the trial court enumerated—all of which, in our view, are in furtherance of a financial review team's investigative function and do not constitute governing—the trial court's conclusion that Davis would prevail on the merits was contrary to controlling legal principles. Consequently, there was no likelihood, much less a substantial likelihood, that Davis would prevail on the merits. We conclude that to the extent that the trial court issued declaratory and injunctive relief in Docket No. 309218, that relief was unwarranted and inappropriate.

2. DOCKET NO. 309250

As described earlier in this opinion, the trial court held a hearing on defendant's motions at issue in Docket No. 309250 on March 20, 2012. At the hearing,

the trial court commented on Davis's representations that defendants continued to violate the Open Meetings Act, stating:

> And that was, of course, what I viewed to be a very potential and serious effort to undermine my ruling by appointing a subcommittee of members of this board to do the exact job that the board was supposed to do and then report back to the board, which if anyone had followed the Supreme Court rulings on these points it would have been clear that that would be, if true, a violation of the act.
>
> So now I understand, and maybe I'm all wrong, but what I've picked up from the papers is that now has been discarded and they are not doing any subcommittee, and Mr. Dillon himself, who is the chair of this committee, is going around creating his own plan or having someone under his control create his own plan, submit that to the City of Detroit, submit it to various people without anybody knowing what is going on.
>
> And then Dave Bing—I read the paper. I get the Detroit News. I get the Detroit News/Free Press combo, and I get all these editorials on both sides of things. But the reality is, is that none of us have been told anything. I issued an order that they have to meet properly under the Open Meetings Act. And I am very concerned and uncomfortable with the concept of creating your own plan and submitting it to someone for their approval without having an open meeting and a fair, frank discussion under the Open Meetings Act policy of these things.

The trial court went on to comment:

> I am happy to have anybody appeal. But my orders are in place until the court of appeals overturns them. And if anybody says that the Open Meetings Act doesn't apply here it certainly won't be the court of appeals.

The trial court concluded by stating:

> All I said was, all I said was is there can be no agreement executed with the City of Detroit under this plan until such

> time as I see that the act has been complied with in an open and fair and frank manner. And that may well happen in minutes and they'll explain it to us and we'll all go home happy. I'll sign an order to that effect . . . .

After the hearing, the trial court issued its March 20, 2012, order. In that order, the trial court adjourned the show-cause hearing to March 29, 2012, and ordered defendants' counsel to produce five members of the Detroit Financial Review Team to provide testimony at the show-cause hearing. The trial court further ordered the Detroit Financial Review Team and the State Treasurer not to execute or sign a consent agreement or its equivalent with the City of Detroit, the Detroit City Council, or the Mayor of Detroit until further order of the trial court.

We presume, from the context of this case, that the trial court relied on its previous finding that Davis was likely to prevail on the merits as one of the underlying reasons for issuing its March 20, 2012, order, although that is not clear from the record. While the trial court did, for the first time, make some brief references to the provisions of the Open Meetings Act, its ruling from the bench and its subsequent order simply contain no analysis of the functions of a financial review team through the lens of the requirements of that act.

Accordingly, we conclude that the trial court's analysis was contrary to controlling legal principles. And, thus, there was no basis for the trial court to conclude that Davis was likely to prevail on the merits.

3. DOCKET NO. 309482

After McNeil filed his complaint on March 29, 2012, the trial court, without hearing from defendants, on March 30, 2012, issued a temporary restraining order and order to show cause that, among other things,

found that McNeil was likely to succeed on the merits of his claims because the defendants "have issued at least one decision, on March 26, 2012, which was done based upon deliberations and/or decisions which took place in private." The trial court further found that McNeil was likely to succeed on the merits of his claim that defendants had violated the Open Meetings Act "by engaging in discussions and deliberations concerning the negotiations or execution of a consent agreement and/or similar document (i.e., financial stability agreement), as such discussions and deliberations were not in public."

In that order, the trial court was making distinctly factual findings. Presumably, these findings were based on McNeil's complaint because there was no other record before the trial court at the time of its order. Indeed, the trial court apparently issued its order without hearing from defendants, which is of itself distressing given the accessibility of defendants' attorneys in the Lansing area. We decline to review these factual findings because they are irrelevant in light of our conclusion that the State Treasurer and the Detroit Financial Review Team are not public bodies under the Open Meetings Act. Therefore, the trial court's finding that McNeil was likely to succeed on the merits is contrary to controlling legal principles.

E. IRREPARABLE HARM

The trial court twice referred to the irreparable-harm standard in its various rulings and orders in these consolidated appeals. The first reference was contained in its ruling concerning the preliminary injunction on February 6, 2012, when it stated:

> But I do think that when you have a statute that requires open meetings and where the agency on its own authority is refusing to comply or that board is not com-

> plying with the requirements under that statute, *that that is, per se, irreparable harm to the people of this state who have a right, who have a right to know what their boards and commissions who have this kind of power are actually doing*.[143]

The second reference was in the trial court's order of March 30, 2012, concerning McNeil's request for a temporary restraining order, in which the trial court stated:

> It is further ordered that [McNeil] may be entitled to [the injunctive relief described in the preceding paragraph of the order] *in order to prevent irreparable harm*, because [McNeil] will suffer more harm without an injunction than the Defendants will with an injunction, and the public interest weighs in favor of the issuance of the injunction.[144]

Thus, the trial court was aware of the requirement for a showing of irreparable harm before the issuance of injunctive relief. Further, the idea that there is *per se* irreparable harm to the public when a violation of the Open Meetings Act occurs has some support in caselaw.[145] But caselaw also recognizes that when the record fails to indicate that a public body has acted in bad faith, there is no real and imminent danger of irreparable injury requiring issuance of an injunction.[146]

In this case, in its February 15, 2012, ruling from the bench concerning Davis's motion for a declaratory

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[143] Emphasis added.

[144] Emphasis added.

[145] See, for example, *The Detroit News, Inc v Detroit*, 185 Mich App 296, 301; 460 NW2d 312 (1990) ("We believe it is implicit in the purpose of 'sunshine laws' such as the [Open Meetings Act] that there is real and imminent danger of irreparable injury when governmental bodies act in secret.").

[146] See *Esperance v Chesterfield Twp*, 89 Mich App 456, 464-465; 280 NW2d 559 (1979), citing *Wexford Co Prosecutor v Pranger*, 83 Mich App 197, 205; 268 NW2d 344 (1978).

judgment, the trial court clearly found that there was no bad faith on the part of defendants. The trial court stated, "There is no question in my mind that none of these people had any bad motives. No one had any ulterior motives. They simply were following what they believe the statute gave them the powers to do." And in its February 6, 2012, ruling from the bench in the same case, the trial court stated, "I don't think there is any allegation that our Governor or Mr. Dillon did anything wrong other than meet under this statute that they were required to by the legislature." With such findings concerning the lack of bad faith in the record, there was no basis for the trial court's conclusion that there was *per se* irreparable harm to the people.

Our conclusion here is further supported by *Nicholas v Meridian Charter Township Board*,[147] in which the Court noted that, "[m]erely because a violation of the [Open Meetings Act] has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future." And, as previously noted, this Court in *Straus* stated that declaratory relief should be considered first and will suffice in most cases involving the legislative and executive branches.[148]

Thus, we conclude that the trial court's issuance of injunctive relief in Davis's case on the basis of a finding of irreparable harm was an abuse of discretion. The trial court explicitly found that there was no bad faith on the part of defendants. And there had been no

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[147] *Nichols v Meridian Charter Twp Bd*, 239 Mich App 525, 533-534; 609 NW2d 574 (2000). See also MCL 15.270(2) ("A decision made by a public body *may* be invalidated if the public body has not complied with the [Open Meetings Act] requirements . . . in making the decision . . . *and* the court finds that the noncompliance or failure has impaired the rights of the public under [the Open Meetings Act].") (emphasis added).

[148] *Straus*, 459 Mich at 532.

showing that declaratory relief had failed. Rather, the trial court's February 29, 2012, order contained declaratory relief that obviated any need for injunctive relief at that time.

We are, of course, cognizant of the fact that, after the trial court made its decisions on the merits of Davis's Open Meetings Act claim, Davis sought civil contempt relief against the State Treasurer and the Detroit Financial Review Team. However, Davis's allegation of contemptuous conduct was made *after* the trial court had issued its injunctive orders on February 6 and February 29, 2012. Rather obviously, events occurring subsequent to the grant of injunctive relief cannot retroactively justify the grant of such relief. But equally obviously, parties to litigation must follow rulings and orders of a trial court acting within its jurisdiction unless and until those rulings and orders are stayed or reversed. It is well established that a person may not disregard a court order simply on the basis of a subjective view that the order is wrong or will be declared invalid on appeal.[149] We therefore turn to the question of possible contempt of court in Docket No. 309250.

IV. CONTEMPT OF COURT

We review for an abuse of discretion a trial court's issuance of a contempt order, but we review for clear error its underlying factual findings, and we review de novo questions of law.[150] As Davis points out, a trial court has the inherent and statutory authority to enforce its orders.[151] Further, "[a] party must obey an order entered by a court with proper jurisdiction, even

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[149] *Porter v Porter*, 285 Mich App 450, 465; 776 NW2d 377 (2009).

[150] *Id.* at 454-455.

[151] See MCL 600.611; MCL 600.1715.

if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date."[152] And the validity of an order is determined by the courts, not the parties.[153]

In his motion for civil contempt, Davis alleged that the Detroit Financial Review Team, including the State Treasurer, voted by resolution at a public meeting to create a five-member subcommittee and to delegate to that subcommittee authority to consider the risks and benefits of appointment of an emergency manager or institution of a consent agreement as well as to utilize staff of the Department of Treasury, conduct interviews, and hire professional consultants if necessary and that this subcommittee convened in private, with Davis being denied entry to the subcommittee meeting. Davis supported these allegations with affidavits from himself and another person.

We have determined that the Detroit Financial Review Team was not a public body and that the trial court abused its discretion by issuing injunctive relief. Therefore, we have determined that various rulings and orders of the trial court in these consolidated appeals were incorrect. But, of course, that is immaterial to the fact that defendants were obligated to obey those orders while they were in effect. And we cannot conclude that the trial court abused its discretion by scheduling a show-cause hearing based upon Davis's motion for civil contempt.

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[152] *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998), citing *In re Hague*, 412 Mich 532, 544-545; 315 NW2d 524 (1982).

[153] *State Bar of Mich v Cramer*, 399 Mich 116, 125-126; 249 NW2d 1 (1976), overruled on other grounds by *Dressel v Ameribank*, 468 Mich 557, 562 (2003).

Before an order to show cause why a party should not be held in contempt may issue, "there must be 'a sufficient foundation of competent evidence, and legitimate inferences therefrom.' "[154] But a finding of willful disobedience of a court order is *not* necessary for a finding of civil contempt.[155] According to Davis's affidavits in support of the motion for civil contempt, the Detroit Financial Review Team allegedly voted to delegate substantial portions of its duties to a five-member subcommittee that allegedly met in private despite the trial court's holding that the Detroit Financial Review Team is a public body subject to the Open Meetings Act.

It is well established in Michigan caselaw, particularly by the Supreme Court's opinion in *Booth Newspapers* and this Court's opinion in *Morrison*, that a public body cannot evade its duty to comply with the Open Meetings Act by delegating its powers to a subcommittee.[156] Thus, we conclude that Davis's allegations about the Detroit Financial Review Team forming a subcommittee to which it delegated substantial portions of its duties and which met in private, provided a sufficient foundation for the trial court to order a show-cause hearing on Davis's motion for civil contempt.

We emphasize that our holding that a review team is not actually a public body subject to the Open Meetings Act is immaterial to this conclusion. Again, a party may not disregard a court order on the basis of a subjective view that the order is wrong or will be declared invalid

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[154] *In re Contempt of Steingold (In re Smith)*, 244 Mich App 153, 158; 624 NW2d 504 (2000), quoting *In re Contempt of Calcutt*, 184 Mich App 749, 757; 458 NW2d 919 (1990).

[155] *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 501; 608 NW2d 105 (2000).

[156] See *Booth Newspapers*, 444 Mich at 225-226; *Morrison*, 255 Mich App at 519-520.

on appeal.[157] Rather, " '[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect . . . .' "[158] Thus, despite our conclusion that a review team is not subject to the Open Meetings Act, the Detroit Financial Review Team was required to obey the trial court's orders requiring it to adhere to the Open Meetings Act as long as those orders remained in effect and had not been stayed or reversed on appeal.

Accordingly, we remand *Davis v Detroit Financial Review Team* (Docket No. 309250) to the trial court for further appropriate proceedings regarding Davis's motion for civil contempt. We note that, generally, coercion to force compliance with a court order and compensatory relief for a complainant are both appropriate potential sanctions for civil contempt.[159] But in light of our holding that the Open Meetings Act does not apply to a review team, it is no longer appropriate for the trial court to seek to compel the Detroit Financial Review Team to comply with the Open Meetings Act, and such an action by the trial court is not within the scope of our remand.

Nevertheless, Davis could potentially be entitled to a civil contempt sanction in the form of a compensatory award of attorney fees, other costs, or both that he incurred on the basis of any proven civil contempt by the Detroit Financial Review Team, the State Treasurer, or both. For example, Davis may be entitled to an award for attorney fees incurred in bringing his motion for civil contempt relief in the event that he proves such civil contempt.

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[157] *Porter*, 285 Mich App at 465.

[158] *In re Contempt of Dudzinski*, 257 Mich App 96, 110; 667 NW2d 68 (2003), quoting *Kirby*, 459 Mich at 40.

[159] *Contempt of United Stationers*, 239 Mich App at 499.

V. CONCLUSION

We hold that a financial review team, and therefore the Detroit Financial Review Team, is not a "governing body" and therefore is not a "public body" under the Open Meetings Act and is not statutorily required to comply with the Open Meetings Act. We also conclude that the State Treasurer, whether acting in his executive capacity or as a "one man committee" of the Detroit Financial Review Team, is not a "public body."

We further conclude that the trial court's various rulings and orders in these consolidated appeals on their face constituted injunctive relief, and we hold that the trial court abused its discretion when it issued such injunctive relief. We therefore reverse and vacate these rulings and orders in their entirety. Accordingly, with regard to Docket Nos. 309218 and 309482, we remand to the trial court for entry of judgment in favor of defendants on the merits of the Open Meetings Act claims brought by Davis and McNeil, respectively. However, in Docket No. 309250, we remand for an evidentiary hearing on Davis's allegations that various state officials and members of the Detroit Financial Review Team were in contempt of court.

No costs, a public question being involved. Pursuant to MCR 7.215(F)(2), this opinion shall be given immediate effect. We do not retain jurisdiction.

M. J. KELLY, J., concurred with WHITBECK, P.J.

O'CONNELL, J. (*concurring in part and dissenting in part*). I concur with the majority opinion that the City of Detroit Financial Review Team is not subject to the Open Meetings Act (OMA), MCL 15.261 *et seq*. I also concur that the Governor and the State Treasurer, being individual executive branch officeholders, are not

subject to the strictures of the OMA in these cases.[1] I part ways with the majority opinion in its discussion of injunctive and declaratory relief. I write separately to emphasize that an injunction against a coequal branch of government should be an extremely rare remedy, available only after a party has definitively established that a declaratory judgment has been ineffective.

I also write separately to remind all public servants that our governmental system turns on a respectful balance of power among the three branches of government. As Thomas Jefferson aptly explained, "the constitution, in keeping three departments distinct and independent, restrains the authority of the judges to judiciary organs, as it does the executive and legislative to executive and legislative organs." Ford, ed, Letter from Thomas Jefferson to William Charles Jarvis (September 28, 1820), in *The Writings of Thomas Jefferson*, (New York: G. P. Putnam's Sons, The Knickerbocker Press, 1899), vol X, p 161. The judicial branch's responsibility is to interpret the law impartially, free from the political process reserved for the other two branches of government. In my view, these tenets preclude any remand in this case. I would reverse all of the trial court's rulings.[2]

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[1] In my opinion, neither the Governor nor the State Treasurer acting in the scope of official duties is subject to the OMA, even if acting as a one-person subcommittee of a public body that is subject to the OMA.

[2] These cases involve the relationship between the OMA and the Local Government and School District Fiscal Accountability Act, MCL 141.1501 *et seq*., commonly known as the emergency financial manager act. The central issue presented to us in these cases is whether a review team that the Governor appoints under § 12(3) of the emergency financial manager act, MCL 141.1512(3), is a "public body," as defined in § 2(a) of the OMA, MCL 15.262(a). The entire panel agrees that a review team—and therefore the Detroit Financial Review Team—is not a public body under the OMA. Because the trial court erred by concluding that a

I. SEPARATION OF POWERS AND THE TRIAL COURT'S INTRUSION INTO THE POLITICAL PROCESS

All judges, including me, are at risk of overstepping boundaries during an intense, frenetic legal battle, and, for that reason, all judges must rely on the federal and state constitutions, each other, and the appellate system to recognize and respect boundaries.[3] On issues of first impression, such as the OMA issue at the core of the present dispute, it is not unusual to be reversed by a higher court. Trial courts must make rapid-fire decisions, while the appellate courts can take weeks, even months, to research and deliberate. All judges will do well to keep in mind Thomas Jefferson's insightful observations: "One single object . . . will entitle you to the endless gratitude of society; that of restraining judges from usurping legislation." Lipscomb & Bergh, eds, Letter from Thomas Jefferson to Edward Livingston (March 25, 1825), in *The Writings of Thomas Jefferson* (Washington, D.C.: The Thomas Jefferson Memorial Association, Library ed, 1904), vol XVI, p 113. And similarly, "[judges] have at times overstepped their limit by undertaking to command executive officers in the discharge of their executive duties . . . ." Ford, ed, Letter from Jefferson to Jarvis, in *The Writings of Thomas Jefferson*, p 161.

At the heart of the cases now before the Court is the political question doctrine.[4] The doctrine requires

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review team is a public body, I believe we are compelled to reverse and vacate the various rulings and orders the trial court entered in these cases.

[3] In this regard, we as judges are susceptible to what is commonly known as "judicial robe disease." We reduce our susceptibility by adhering to the constitutional separation-of-powers principles.

[4] For an extensive discussion of the concept of separation of powers and the political question doctrine, see *Bendix Safety Restraints Group, Allied Signal, Inc v City of Troy*, 215 Mich App 289, 294-300; 544 NW2d 481

judges to avoid entering into the political process and to put aside personal policy preferences when interpreting statutes. As the United States Supreme Court has stated, the Framers of the Constitution recognized the "sharp necessity to separate the legislative from the judicial power . . . ." *Plaut v Spendthrift Farm, Inc*, 514 US 211, 221; 115 S Ct 1447; 131 L Ed 2d 328 (1995). Judges cannot avoid their responsibility to decide cases merely because the cases present issues having political implications. See *Zivotofsky ex rel Zivotofsky v Clinton*, 566 US ___, ___; 132 S Ct 1421, 1427-1428; 182 L Ed 2d 423 (2012). Nevertheless, under the political question doctrine, courts do not have authority to decide matters that the constitutional text demonstrably commits to a coordinate political department, or matters that lack judicially discoverable and manageable standards for resolution. *Id*. at ___; 132 S Ct at 1427.

With these considerations in mind, the critical legal question for the trial court to consider was whether the Detroit Financial Review Team is a "public body" within the meaning of the OMA—not whether a review team *should* (in the trial court's opinion) be subject to the OMA or whether it is desirable (again, in the trial court's opinion) for some or all of the meetings of the Detroit Financial Review Team to be open to the public. Unfortunately, the trial court missed this critical question. Rather, as reflected in the trial court's emphasis at the February 15, 2012, hearing in this matter on its belief that "[t]he first caveat of this society is that we have an open government," it appears that the trial

(1996) (O'CONNELL, J., concurring). Or, simply consider John Adams's pithy summary: "[T]he judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both . . . ." Kurland & Lerner, eds, John Adams, Thoughts on Government (April 1776), in *The Founders' Constitution* (Chicago: The University of Chicago Press, 2000), vol I, p 109.

court's personal views clouded its resolution of the legal issues. No matter how laudable, a judge's personal views have no place in jurisprudence: "courts are not free to manipulate interpretations of statutes to accommodate their own views of the overall purpose of legislation." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 531; 676 NW2d 616 (2004).[5] Thus, the trial court's focus in these cases should have been on the narrow legal question whether a review team is a public body under the OMA. Indeed, as the majority makes clear, it is inherent in the OMA's definition of a public body that some governmental bodies are not "public bodies" and, thus, are not subject to the open meeting requirements of the OMA. Concerns about whether the review team's meetings should be public or private are properly addressed to the Legislature, not the judiciary. See *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 461; 770 NW2d 117 (2009) ("Despite the stated policy aims of the statute, we cannot rule on policy grounds in contravention of the plain language of the statute. To the extent that the issues presented relate to public policy matters, the making of social policy generally is for the Legislature, not the courts.").

Further, a trial court's most comfortable function is to review historical facts, apply the law to those facts, and to reach a conclusion as to the lawfulness of the actions of the parties. In the present cases, the trial court preempted the parties' political actions by first assuming that the OMA applied to the Detroit Financial Review Team and then by issuing injunctions to stop the political process, particularly with regard to the Detroit Financial Review Team being able to negotiate a consent agreement with the city of Detroit. As set

[5] Of course, such "manipulation" could occur subconsciously rather than intentionally.

forth in the majority opinion, the trial court failed to apply the law concerning issuance of injunctions and failed to analyze the OMA in any systematic manner. It is worth repeating that courts interpret the law based on existing facts. In this matter, the trial court overstepped its bounds by asserting power over the political process before the process was complete.

Indeed, as referred to by the majority, in *Straus v Governor*, 459 Mich 526, 530; 592 NW2d 53 (1999), the Michigan Supreme Court adopted as its own this Court's opinion in that case. *Straus* includes the following discussion of the propriety of injunctive relief against the Governor or other executive branch actors:

> It is clear that separation of powers principles, Const 1963, art 3, § 2, preclude mandatory injunctive relief, mandamus, against the Governor. *People ex rel Sutherland v Governor*, 29 Mich 320; 18 Am Rep 89 (1874). Whether similar reasoning also puts prohibitory injunctive relief beyond the competence of the judiciary appears to be an open question that need not be resolved in this case. We do note that the Supreme Court has recently recognized that declaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to constitutional requirements or confine them within constitutional limits. *Durant v Michigan*, 456 Mich 175, 205; 566 NW2d 272 (1997). Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations. *Id*. at 206. [*Straus*, 459 Mich at 532 (quotation marks and citation omitted).]

Thus, even if the trial court had been correct in its determination that a financial review team constitutes a public body subject to the OMA, it abused its discretion by granting permanent injunctive relief against the

Detroit Financial Review Team.[6] The trial court simply granted that injunctive relief without any reasonable basis for concluding that it was necessary. Rather, in accordance with judicial restraint and deference to the coordinate executive branch of government as discussed in *Straus*, the trial court should have limited its consideration of any possible relief to declaratory relief. This is especially so, given that the applicability of the OMA to a financial review team under the very recently enacted emergency financial manager act is a matter of first impression and, as reflected in our holding, the Detroit Financial Review Team clearly had serious grounds for a good faith (and correct) belief that it was not required to comply with the OMA. The decision of the trial court to grant injunctive relief in this matter was completely unwarranted.

Accordingly, in future circumstances involving questions of the legality of conduct by state government officials or entities within the executive or legislative branches, a trial court should issue a declaratory judgment regarding those questions and presume that the other branches will follow the court's decision. This measured approach avoids a court immersing itself in the political process reserved for the political branches of government and thereby reduces the risk of stigmatizing the judiciary as being merely another political actor.

Moreover, even apart from the special consideration due to state level executive and legislative branch actors, injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent

[6] A trial court's grant of injunctive relief is reviewed for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

danger of irreparable injury. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). This Court has specifically applied that standard in the context of the OMA and, accordingly, noted that "[m]erely because a violation of the OMA has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future." *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 533; 609 NW2d 574 (2000). This underscores that the grant of injunctive relief by the trial court in this case was inappropriate.

The trial court's interference in the activities of the Detroit Financial Review Team, even going so far as to enter an injunctive order to preclude that review team from entering into a consent agreement with the city of Detroit, markedly disrupted the political process, particularly with sensitive matters involving financial reforms of city government that by their very nature are beyond judicial competence and lack judicially discoverable and manageable standards for resolution. See *Zivotofsky*, 566 US at ___; 132 S Ct at 1427.[7]

[7] There was a more egregious lack of respect for the proper separation of powers by the trial court that presided over *Muma v Flint Financial Review Team*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2012 (Docket No. 309260), with regard to which this panel is releasing a separate opinion. In *Muma*, the plaintiff sought a declaratory judgment concerning the applicability of the OMA to the City of Flint Financial Review Team and an injunction to prevent further alleged violations of the OMA. Rather than issuing a simple declaratory judgment and then allowing the state actors to take further appropriate actions, the trial court in *Muma* used its power to intrude into spheres of government reserved for the political branches. With a figurative swipe of the pen, the trial court permanently enjoined the defendants in that case (the City of Flint Emergency Financial Manager, the Governor, the State Treasurer, and the City of Flint Financial Review Team) "from taking any action reserved to the mayor and city council to govern and administer Flint under its charter and ordinances." *Id*. at 3. Thus, rather

II. CONCLUSION

Courts should not allow themselves to be used as vehicles to interfere with the political process. Except in highly unusual circumstances, it is sufficient for a trial court to issue a declaratory judgment regarding an allegedly improper action by an executive or legislative branch actor. While the trial court's actions were presumably done with no political agenda and with a view to the best interests of the parties (and the city of Detroit), the results were inappropriate injunctions issued against another branch of government, when a simple declaratory judgment would have sufficed.

I would reverse all of the trial court's rulings in their entirety.

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than simply deciding if the City of Flint Financial Review Team had violated the OMA and providing narrow appropriate relief for any perceived violation, the trial court in *Muma* took upon itself to resolve the political future of the city of Flint, a power reserved exclusively to the other branches of government. Trial courts should rule on issues of law and not involve themselves in political questions reserved for the political branches—especially when the trial court's hearing in *Muma* took less than an hour to undo what took the other branches of government over six months to put in place. Courts are not in the business of resolving political questions. In *Muma* and the present case, a simple declaratory judgment regarding the (supposed) applicability of the OMA would have alerted the state actors to the trial court's determinations with regard to whether the OMA applied. The courts should not be administering a city government or legislating from the bench. The political question doctrine requires courts to refrain from such inappropriate engagement in the political process.

PEOPLE v KLOOSTERMAN

Docket No. 303443. Submitted April 13, 2012, at Grand Rapids. Decided May 22, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 877.

A jury in the Kent Circuit Court, Paul J. Sullivan, J., convicted Eric A. Kloosterman of conducting a criminal enterprise (racketeering) in violation of MCL 750.159i(1) for fraudulently returning merchandise to a store. Defendant appealed.

The Court of Appeals *held*:

1. MCL 750.159i(1) prohibits a person employed by or associated with an enterprise from knowingly conducting or participating in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity. Although the statutory definitions of "person" and "enterprise" include an individual, these words must be considered in the context of the provision as a whole. Because of the way in which MCL 750.159i(1) is structured, a defendant acting alone cannot be both the person and the enterprise. To associate, a person must necessarily align or partner with another person or entity, and to be employed requires that a person have been engaged or hired by some other entity. Consequently, the statute's requirement that the person be employed by or associated with an enterprise, as well as the reference to sole proprietorships in the definition of "enterprise," necessarily requires at least two distinct entities to have been involved. The enterprise must be either a separate and distinct individual or any other legally distinct entity falling within the definition of "enterprise." Because the prosecution presented no evidence in this case to show that defendant associated with or was employed by any other physical or legal person or entity, there was insufficient evidence to support his conviction.

2. Although defendant conceded that there was sufficient evidence to convict him of first-degree retail fraud, MCL 750.356c, it cannot be unequivocally stated that the jury's verdict included a specific finding of every element necessary to support a conviction of this cognate offense. As long as double jeopardy is not implicated in the process, however, there is nothing to preclude the prosecutor from charging defendant with a cognate offense.

Conviction and sentence vacated.

CRIMINAL LAW — RACKETEERING — INVOLVEMENT OF TWO DISTINCT ENTITIES.

MCL 750.159i(1) prohibits a person employed by or associated with an enterprise from knowingly conducting or participating in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity; to establish a violation of this provision, the prosecution must show that the defendant was employed by or associated with a separate and distinct individual or any other legally distinct entity falling within the definition of "enterprise" in MCL 750.159f(a); a defendant acting alone cannot be both the person and the enterprise.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

Daniel J. Rust for defendant.

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant, Eric A. Kloosterman, appeals as of right his conviction by jury trial for conducting a criminal enterprise (racketeering), MCL 750.159i(1). We vacate defendant's conviction and sentence.

Defendant's conviction arose from a series of fraudulent returns at a Home Depot store. Dustin Vandermeer, an asset-protection specialist, was alerted to a suspected fraudulent return and subsequently began an investigation. Vandermeer's investigation involved suspicious returns connected to three separate pieces of identification,[1] and upon viewing surveillance videos corresponding to those returns, Vandermeer discovered that the same individual appeared to be responsible for all of them.

[1] To process a return without a receipt, Home Depot requires that the customer present a Michigan driver's license or a Michigan identification card.

On April 7, 2010, Sheila Allen, a returns cashier, alerted Vandermeer to yet another potentially fraudulent return. One week later, Vandermeer called the police, provided them with receipts from the suspected fraudulent transactions, and provided defendant's name as a possible suspect. Police found eight items for sale on craigslist associated with defendant's telephone number and instructions to interested buyers to call "Eric," who identified himself as a construction worker. Additionally, a number of the products for sale were Ryobi products, a brand sold exclusively at Home Depot, and many of them were described as new.

The police subsequently responded to the craigslist advertisement, set up a meeting, and arrested defendant upon his arrival at the arranged meeting place. A police search of defendant and his vehicle revealed the pieces of identification used for the fraudulent returns and a number of new and used Ryobi products.

At trial, both Vandermeer and Allen testified that defendant was the individual they saw on April 7, 2010, and Vandermeer identified defendant as the suspect he had seen in the surveillance videos. Copies of the receipts were also admitted into evidence, some of which were signed with defendant's name.

Defendant claims there was insufficient evidence to sustain his racketeering conviction under MCL 750.159i(1) because he was neither employed by nor associated with a criminal enterprise. Specifically, defendant asserts that the prosecution failed to present sufficient evidence of defendant's involvement in a criminal enterprise separate and distinct from himself. The prosecution argues, however, that the language of MCL 750.159i(1) does not make this distinction. Instead, because the definition of "enterprise" includes

"individual[s]," MCL 750.159f(a), defendant's pattern of activity supports his racketeering conviction.

Claims of insufficient evidence are reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). A court reviewing the sufficiency of the evidence must view the evidence in the light most favorable to the prosecution and determine whether the evidence was sufficient to allow any rational trier of fact to find guilt beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Questions of statutory interpretation are also reviewed de novo. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008). When interpreting a statute, this Court's primary purpose is to give effect to the intent of the Legislature. *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed and further judicial construction is impermissible. *Id*. at 330. Words in a statute are given their plain and ordinary meaning, *id*., and in addition to considering the plain meaning of words, courts must consider the placement and purpose of those words in the context of the statutory scheme, *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006).

However, if the statutory language is ambiguous, judicial construction is appropriate. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible of more than one meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). "A statute that is unambiguous on its face may be rendered ambiguous by its interaction with, and its relation to, other statutes." *People v McLaughlin*, 258 Mich App 635, 673; 672 NW2d 860 (2003). In construing a statute, "[t]he court should presume that every word has some meaning and should

avoid any construction that would render a statute, or any part of it, surplusage or nugatory." *People v Nickerson*, 227 Mich App 434, 439; 575 NW2d 804 (1998).

Defendant was convicted under MCL 750.159i(1), which reads:

> A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.

The definition of "person" includes "individual[s]." MCL 750.159f(d). The definition of "enterprise" also includes "individual[s]." MCL 750.159f(a). But we must consider these words in the context of the provision as a whole. *Gillis*, 474 Mich at 114. To do this, we must define "associate" and "employ," and because the statute under which defendant was convicted does not define these terms, this Court may consult dictionary definitions to determine their plain meanings. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). The word "associate" means "to align or commit (oneself) as a companion, partner, or colleague," *Random House Webster's College Dictionary* (1997), def 2, and the word "employ" means "to engage the services of (a person or persons); hire," *id*., def 1.

There is no dispute that, as an individual, defendant could meet the definitions of both a "person" and an "enterprise." But these definitions may not be applied in a vacuum. Because of the way in which MCL 750.159i(1) is structured, a defendant, acting alone, cannot be *both* the person *and* the enterprise. To associate, a person must necessarily align or partner with *another* person or entity. Indeed, the meaning of the word is not ordinarily interpreted as meaning that a person associates with himself or herself, and it would stretch the meaning of the word beyond reason to

conclude that the Legislature intended such an unusual usage. Similarly, to be employed requires that a person have been engaged or hired by some other entity; people do not generally find themselves in a situation calling for hiring themselves or engaging their own services.

Consequently, we conclude that the Legislature's inclusion of the requirement that the person be *employed by or associated with* an enterprise necessarily requires *at least two distinct entities* to have been involved to support a conviction under MCL 750.159i(1). The prosecution asserts that defendant could have been self-employed, but that assertion ignores the inclusion of both "individual" and "sole proprietorship" in the definition of "enterprise" in MCL 750.159f(a). We decline to twist the interpretation of the statute to render the inclusion of "sole proprietorship" surplusage.[2]

We conclude that, applying the plain and ordinary meaning of the words in MCL 750.159i(1), the statute requires the prosecution to show that the enterprise was either a separate and distinct individual or any other legally distinct entity falling within the definition of

[2] We recognize that there are two prior unpublished opinions from this Court that addressed this issue. Unpublished opinions are not binding authority, but they may be persuasive. MCR 7.215(C)(1); *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004). These opinions—*People v Polk*, unpublished opinion per curiam of the Court of Appeals, issued March 2, 2010 (Docket No. 286772), and *People v Boles*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011 (Docket No. 296684)—arrived at conclusions seemingly contrary to each other. In *Polk*, a panel of this Court declined to adopt the defendant's argument that racketeering required the involvement of at least two individuals, chiefly because the defendant had offered no caselaw to support it. In contrast, in *Boles*, a later panel of this Court had an opportunity to conduct a thorough analysis, and it subsequently held that the employment or association requirements in the statute required at least two entities, whether physically or legally distinct. We find the analysis in *Boles* persuasive and agree with its conclusion.

"enterprise."[3] Because no evidence was presented in this case to show that defendant associated with or was employed by any other physical or legal person or entity, there was insufficient evidence to support his conviction for conducting a criminal enterprise under MCL 750.159i.[4]

Defendant's conviction and sentence are vacated. Despite defendant's concession that there is sufficient evidence to convict him of first-degree retail fraud, MCL 750.356c, we cannot state unequivocally that the jury's verdict included a specific finding of every element necessary to support a conviction of this cognate offense. See *People v Bearss*, 463 Mich 623, 632-633; 625 NW2d 10 (2001). As long as double jeopardy is not implicated in the process, see Const 1963, art 1, § 15; *People v Smith*, 478 Mich 292, 298-304; 733 NW2d 351 (2007), there is nothing to preclude the prosecutor from charging defendant with a cognate offense.

BECKERING, P.J., and OWENS, J., concurred with RONAYNE KRAUSE, J.

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[3] " 'Enterprise' includes an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity." MCL 750.159f(a).

[4] The federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961 *et seq.*, bears some similarity to the statute at bar. The phrase "any person employed by or associated with any enterprise" in 18 USC 1962(c), in which the definitions of "person" and "enterprise" both include "individual[s]," 18 USC 1961(3) and (4), has been held by the United States Supreme Court to plainly require "two distinct entities" because "[i]n ordinary English one speaks of employing, being employed by, or associating with others, not oneself." *Cedric Kushner Promotions, Ltd v King*, 533 US 158, 161; 121 S Ct 2087; 150 L Ed 2d 198 (2001). We agree with that reasoning with regard to the plain meaning of that particular usage of the English language, although we do not rely on it in light of our Supreme Court's disapproval of construing Michigan's racketeering statute on the basis of federal authorities' analyses of RICO. *People v Guerra*, 469 Mich 966 (2003); *People v Gonzalez*, 469 Mich 967 (2003).

PEOPLE v COMELLA

Docket No. 301458. Submitted February 7, 2012, at Grand Rapids. Decided May 24, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 905.

A jury in the Kent Circuit Court, Dennis B. Leiber, J., convicted Agostino Comella, Jr., of first-degree felony murder, MCL 750.316(1)(b), for causing the fatal head injury of his wife, a vulnerable adult, in violation of MCL 750.145n, which prohibits vulnerable-adult abuse. Defendant appealed, arguing that the prosecution was required to prove that he committed both first- and second-degree vulnerable-adult abuse as predicate felonies to establish felony murder.

The Court of Appeals *held*:

1. The requirements for convicting a defendant of felony murder may be satisfied by proving the commission of either first-degree vulnerable-adult abuse or second-degree vulnerable-adult abuse. MCL 750.316(1)(b) defines felony murder as murder committed in the perpetration of, or attempt to perpetrate, arson; first-, second-, or third-degree criminal sexual conduct; first-degree child abuse; a major controlled substance offense; robbery; carjacking; breaking and entering of a dwelling; first- or second-degree home invasion; larceny of any kind; extortion; kidnapping; first- and second-degree vulnerable-adult abuse; torture; or aggravated stalking. Although the Legislature used the conjunction "and" rather than "or" when it amended the felony-murder statute to include both degrees of vulnerable-adult abuse, there was no obvious reason why the Legislature would require a defendant to commit both first- and second-degree vulnerable-adult abuse to be guilty of felony murder, and it would be the only circumstance under which a defendant would have to commit two predicate felonies to be guilty of felony murder. Further, reading the statute as requiring both first- and second-degree vulnerable-adult abuse would render that portion of the statute meaningless because it is impossible to commit both crimes in the same act. Under MCL 750.145n(1), first-degree vulnerable-adult abuse occurs when the caregiver intentionally causes serious physical harm or serious mental harm to a vulnerable adult, while under MCL 750.145n(2), second-degree vulnerable-adult abuse occurs when

the reckless act or reckless failure to act of the caregiver or other person with authority over the vulnerable adult causes the vulnerable adult serious physical harm or serious mental harm. To require the prosecution to prove both would be to require proof of an oxymoron, because one cannot act with both intent and recklessness. It is more likely that the Legislature inadvertently used the conjunctive word "and" while overlooking the fact that the other offenses listed in the statute were joined by the disjunctive word "or" than it is that the Legislature amended the statute to add a requirement that would be impossible to meet. Interpreting the statute using the latter conclusion would render MCL 750.316(1)(b) dubious and the addition of vulnerable-adult abuse to the list of underlying offenses surplusage and nugatory. Defendant's arguments involving the failure to prove first-degree vulnerable-adult abuse, including his argument concerning ineffective assistance of counsel for failure to request an instruction, are without merit because first-degree vulnerable-adult abuse was not, and need not have been, part of the prosecutor's theory of the case.

2. There was sufficient evidence to establish the element of malice. In a felony-murder case, malice is established by showing an intent to kill, an intent to cause great bodily harm, or that the defendant created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result. Testimony indicated that defendant was aware that the victim was in a weakened physical condition because of her various medical problems, and defendant admitted that he had hit and pushed the victim on multiple occasions. In light of the victim's medical condition, a reasonable trier of fact could have concluded that defendant knew that slamming the victim into a wall with sufficient force to cause her to fall to the floor and hit her head was likely to cause death or great bodily harm.

3. Defendant did not establish that his counsel was ineffective for failing to move to suppress statements made during a custodial interview before defendant had been read his rights under *Miranda v Arizona*, 384 US 436 (1966). To establish ineffective assistance of counsel on this ground, defendant must show that he would have prevailed on the issue. Because there were arguments both in favor of and against finding that the interview took place in a custodial environment, it was unclear whether defendant would have prevailed on the issue and his ineffective-assistance claim therefore failed. Further, counsel was not ineffective for failing to object to the prosecutor's comments that the victim had been beaten and that defendant was controlling be-

cause those statements were supported by the evidence or reasonable inferences drawn from it and counsel was not required to make a meritless objection.

Affirmed.

CRIMINAL LAW — FELONY MURDER — VULNERABLE-ADULT ABUSE.

The first-degree murder statute defines felony murder as including murder committed in the perpetration of first- and second-degree vulnerable-adult abuse; the prosecution need not prove that a defendant committed both first-degree vulnerable-adult abuse and second-degree vulnerable-adult abuse to support a conviction of felony murder on this basis (MCL 750.145n, 750.316[1][b]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *Kimberly M. Manns*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann* and *Kathy Hoffman Murphy*) for defendant.

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

SAWYER, P.J. The central issue in this case is whether, under the felony-murder statute,[1] when the predicate felony is abuse of a vulnerable adult, the prosecution must prove that a defendant committed both first- and second-degree vulnerable-adult abuse.[2] We hold that the prosecution must only show either offense, not both.

Defendant's wife, Ella, died on October 11, 2009. On a number of occasions before her death she needed medical attention for a variety of injuries. On July 31, she was admitted to the Metropolitan Hospital inten-

[1] MCL 750.316(1)(b).

[2] MCL 750.145n.

sive care unit for a fractured hip, hemorrhagic shock, and acute renal failure. Defendant gave conflicting accounts of the cause of the victim's injuries. Their daughter, Mary, had observed bruises on the victim and alerted the hospital staff, indicating her concern that defendant may have abused the victim.

Thereafter, in September, Mary visited her parents and observed bruises on the victim. When she asked defendant about them, he became angry and assaulted her. Both Mary and their other daughter contacted Adult Protective Services (APS). A few days later, during a follow-up medical visit with Dr. Chandini Valeeswarah, Valeeswarah observed multiple bruises on the victim's body. Defendant explained that the victim had fallen recently. Valeeswarah did not believe that the injuries were consistent with defendant's account and directed his staff to contact APS. A referral to APS also was made by the rehabilitation center that treated the victim after her physical therapist observed suspicious bruises.

While the APS investigation was pending, paramedics were summoned to the Comellas' home on October 9 because the victim was injured and unconscious. The victim was taken to the hospital, where she was admitted for a subdural hematoma. The victim died on October 11. Following an autopsy, the medical examiner determined that the cause of death was blunt-force impact to the head and that the manner of death was homicide. Defendant was thereafter convicted of first-degree felony murder and sentenced to the mandatory term of life in prison without the possibility of parole. He now appeals, and we affirm.

On appeal, defendant raises a number of arguments to support his claims that there was insufficient evidence to support his conviction and that he received

ineffective assistance of counsel. We turn first to an argument that is present in both issues, namely, whether the prosecutor was obligated to prove both first- and second-degree vulnerable-adult abuse to establish the underlying felony for the felony-murder charge. The prosecutor had proceeded on the theory that the predicate felony was second-degree vulnerable-adult abuse. Defendant argues on appeal that the felony-murder statute requires proof that defendant committed both first- and second-degree vulnerable-adult abuse and, because the prosecutor did not prove that defendant committed first-degree vulnerable-adult abuse, there was insufficient evidence to support the felony-murder conviction. Similarly, defendant argues that trial counsel was ineffective for failing to object to the jury instructions that did not include an instruction that the prosecutor had to prove first-degree vulnerable-adult abuse. We disagree.

MCL 750.316(1)(b) defines first-degree felony murder as

> [m]urder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first and second degree under [MCL 750.145n], torture under [MCL 750.85], or aggravated stalking under [MCL 750.411i].

The basis for defendant's argument lies in the fact that, with the exception of the reference to vulnerable-adult abuse, the statute uses the disjunctive word "or." This is true both in regard to the list of crimes as a whole and the references to the other two crimes with multiple degrees that satisfy the felony-murder rule (i.e., criminal sexual conduct and home invasion). Yet when the Legislature

amended the statute to add first- and second-degree vulnerable-adult abuse, it chose to use the conjunctive word "and." Thus, defendant argues, the Legislature intended to require proof of both first- and second-degree vulnerable-adult abuse in order to support a conviction of felony murder on this ground.

Questions of statutory interpretation are reviewed de novo.[3] Guiding our review are the following principles:

> Our overriding goal for interpreting a statute is to determine and give effect to the Legislature's intent. The most reliable indicator of the Legislature's intent is the words in the statute. We interpret those words in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole. Moreover, "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." If the statutory language is unambiguous, no further judicial construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed. [*People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011), quoting *AFSCME v Detroit*, 468 Mich 388, 399-400; 662 NW2d 695 (2003).]

In the context of this statute, we do not believe that the Legislature intended the literal meaning of the word "and" in the reference to vulnerable-adult abuse in the first and second degrees.

As this Court explained in *People v Humphreys*,[4] the inaccurate use of "and" and "or" has infected statutes, creating ambiguities that require judicial construction:

> The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent. *Root v Ins Co*

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[3] *People v Peltola*, 489 Mich 174, 178; 803 NW2d 140 (2011).

[4] *People v Humphreys*, 221 Mich App 443, 451-452; 561 NW2d 868 (1997).

> *of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995). In this case, the use of the disjunctive "or" gives rise to an ambiguity in the statute because it can be read as meaning either "and" or "or." Accordingly, we must construe the word to give effect to the Legislature's intent. *Id.* The Court in *Root*, [214 Mich App] at 109, discussed the often double meaning of the word "or":
>
> > "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context."

Similarly, in *People v Gatski*,[5] this Court observed that the literal meanings of "and" and "or" "should be followed if they do not render the statute dubious, but one will be read in place of the other if necessary to put the meaning in proper context."

Reading the word "and" literally in the vulnerable-adult-abuse portion of the felony-murder statute would render it dubious. First, there is no obvious reason why the Legislature would require a defendant to commit both first- and second-degree vulnerable-adult abuse in order to be guilty of felony murder. It would be the only circumstance under which a defendant would have to commit two predicate felonies in order to be guilty of felony murder. Second, and more importantly, to read the statute as requiring both first- and second-degree vulnerable-adult abuse would render that portion of the statute meaningless because it is impossible to commit both in the same act.

First-degree vulnerable-adult abuse occurs when "the caregiver intentionally causes serious physical

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[5] *People v Gatski*, 260 Mich App 360, 365-366; 677 NW2d 357 (2004).

harm or serious mental harm to a vulnerable adult."[6] By contrast, second-degree vulnerable-adult abuse occurs when "the reckless act or reckless failure to act of the caregiver or other person with authority over the vulnerable adult causes serious physical harm or serious mental harm to a vulnerable adult."[7] To require the prosecution to prove both would be to require proof of an oxymoron. One cannot act with both intent and recklessness. "Reckless" means "utterly unconcerned about consequences."[8] Thus, to prove first-degree vulnerable-adult abuse, the prosecution would have to show that a defendant intentionally caused serious physical harm. But this proof would contradict the requirement of second-degree vulnerable-adult abuse, which would require that a defendant be "utterly unconcerned about the consequences" of the attack. A defendant cannot be utterly unconcerned about whether or not the attack will result in serious harm while at the same time intending to cause serious harm.

It must also be remembered that vulnerable-adult abuse is a recent addition to the felony-murder statute, having been added by 2004 PA 58. It would seem more plausible that when the Legislature added these two offenses to the list of underlying felonies, it did so with the intent to add both first- and second-degree violations to the list, not to add a single requirement of an offense that violated both provisions of the vulnerable-adult-abuse statute, which represents an impossibility. That is, it is more likely that the Legislature in drafting the amendatory act inadvertently made use of the conjunctive word "and" while overlooking the fact that

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[6] MCL 750.145n(1).

[7] MCL 750.145n(2).

[8] *Random House Webster's College Dictionary* (2000).

all the offenses listed in the statute were joined by the disjunctive word "or" than it is that the Legislature took the trouble to amend the statute to add a requirement that would be impossible to meet. To interpret the statute using the latter conclusion would render the statute dubious and the addition of vulnerable-adult abuse to the list of underlying offenses merely surplusage and nugatory.

For these reasons, we conclude that the requirements for felony murder are satisfied by committing either first-degree vulnerable-adult abuse *or* second-degree vulnerable-adult abuse. Accordingly, we conclude that defendant's arguments that there was insufficient evidence to prove first-degree vulnerable-adult abuse and that he was deprived of effective assistance of counsel by his counsel's failing to request an instruction that the prosecutor had to prove first-degree vulnerable-adult abuse is without merit because first-degree vulnerable-adult abuse was not, and need not have been, part of the prosecutor's theory of the case.

Defendant also argues that there was insufficient evidence on the element of malice. We disagree. We review a sufficiency issue by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find each element of the offense proved beyond a reasonable doubt.[9] In the case at bar, defendant challenges whether there was sufficient evidence of the *mens rea* requirement of malice. In a felony-murder case, malice is established by showing an intent to kill, an intent to cause great bodily harm, or that the defendant created a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the

[9] *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

probable result.[10] In this case, the prosecutor argued the third form of malice.

There was testimony that the victim was in a weakened physical condition because of her various medical problems and that defendant was aware of her condition. Furthermore, defendant admitted when interviewed by detectives that he had hit and pushed the victim on multiple occasions. He further admitted that on one occasion he might have hit her head on the kitchen countertop. On another occasion, according to defendant, he "could of kinda slam [sic] her into the wall." The wall was a bathroom tile wall and "she kinda like bounced off," falling to the floor and hitting her head on the floor. The medical examiner testified that the cause of death was blunt cranial cerebral trauma.

In light of the victim's medical condition, a reasonable trier of fact could conclude that defendant knew that slamming the victim into a tile wall with sufficient force to cause her to fall to the floor and hit her head was likely to cause death or great bodily harm. We are satisfied that there was sufficient evidence of malice to support defendant's conviction.

Defendant also raises additional claims of ineffective assistance of counsel. Specifically, he argues that counsel was ineffective for failing to move to suppress statements made during a custodial interview before defendant had been read his *Miranda*[11] rights and for failing to object to the prosecutor's improper closing argument.

In order to establish ineffective assistance of counsel for failure to move to suppress a custodial statement made before the *Miranda* warnings were given, the

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[10] *Id.* at 758.

[11] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant must show that he or she would have prevailed on the issue.[12] In *People v Mayes (After Remand)*, there was evidence that would have supported both a conclusion that the defendant reasonably believed that he was not free to leave and a conclusion that he was not under arrest.[13] In favor of finding a custodial environment was the fact that the defendant, a high school senior, had been summoned to the principal's office, where he was met by a police officer, frisked, and then interrogated. Although he was free to leave, that fact was never communicated to him.[14] In favor of finding that there was no custodial environment were the facts that he was never told that he was under arrest, he was allowed to leave after being questioned, and the questioning occurred in the principal's office rather than in a police car or police station.[15] This Court ultimately concluded that while it could reasonably have been argued that the defendant was under arrest but had not yet been read the *Miranda* warnings when he made the statement, it was not clear whether the defendant would have prevailed and, therefore, the Court was not convinced that the defendant had received ineffective assistance of counsel.[16]

Similarly, in the case at bar, there are arguments both in favor of finding a custodial environment and against it. In favor of finding a custodial environment, defendant argues that multiple officers were involved in the interview, that defendant stayed in the conference room where the interviews took place between the first

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[12] *People v Mayes (After Remand)*, 202 Mich App 181, 191; 508 NW2d 161 (1993).

[13] *Id.* at 190-191.

[14] *Id.* at 190.

[15] *Id.* at 190-191.

[16] *Id.* at 191.

and second interviews (and had been told to do so), and that he had been searched for a weapon. The prosecution responds by observing that defendant was asked if he was willing to answer questions, was taken to a private room near his wife's hospital room for the interview, was not physically restrained, was never told that he was not free to leave, and was left alone between the interviews. The prosecution also observes that defendant's remaining in the conference room between interviews could be explained by the fact that he may have wished to avoid another confrontation with his daughter, knowing that another confrontation would result in hospital security's removing them from the hospital.

With these points in mind, we must reach the same conclusion that our colleagues did in *Mayes*, namely, that "we are not convinced that defense counsel was ineffective for failing to argue that defendant's confession should have been suppressed, because it is unclear whether defendant would have prevailed on the issue."[17]

Finally, defendant argues that counsel was ineffective for failing to object to improper comments by the prosecutor during closing argument. Specifically, defendant argues that various comments by the prosecutor that the victim had been beaten were not supported by the record, nor were numerous comments that defendant claims disparagingly described him as "a detail man" and as "controlling."

With respect to the comments regarding the victim's having been beaten, a prosecutor is entitled to argue the evidence and reasonable inferences from the evidence.[18]

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[17] *Id*.

[18] *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

In this case, while defendant is correct that there was no testimony from anyone who actually observed the victim being beaten, the conclusion that she had been was certainly a reasonable inference from the record. There was significant evidence regarding the various bruises and other physical injuries suffered by the victim, there was defendant's own admission regarding his physical assaults on the victim, and there was the testimony that a neighbor heard a commotion in the Comellas' home and a female voice crying out in pain. Similarly, there was a variety of testimony during the trial that would support a description of defendant as a controlling individual. For example, he wanted to keep the victim at home after her earlier discharge from the hospital despite medical advice that she go to a long-term-care facility, he did not want others in the home to care for the victim, and he would "nitpick" the victim and become angry when household tasks were not performed to his satisfaction. Even portions of defendant's own testimony could fairly be described as attempting to control the prosecutor's line of questioning.

In short, there was an adequate basis for the prosecutor to make these arguments. Because there was no prosecutorial misconduct, there was no basis for defense counsel to object. And it is not ineffective assistance of counsel to fail to make a meritless objection.[19]

Affirmed.

O'CONNELL and RONAYNE KRAUSE, JJ., concurred with SAWYER, P.J.

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[19] *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

KRUEGER v DEPARTMENT OF TREASURY

Docket No. 302246. Submitted January 10, 2012, at Lansing. Decided May 29, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 917.

Robert A. and Phyllis G. Krueger sought tax refunds from the Department of Treasury in 2003 for the years 1994 through 1997 after having amended their federal tax returns in 2001 pursuant to *Gitlitz v Internal Revenue Comm'r*, 531 US 206 (2001), which entitled them to claim an additional loss from their corporation's discharge of indebtedness. The department initially denied petitioners' claim for refunds on the ground that the claims had been filed outside the four-year limitations period set forth in MCL 205.27a(2). After an informal hearing, a hearing referee recommended that petitioners' claims be denied, and the department accepted the recommendation, ruling that petitioners' federal claim had not tolled the limitations period and that petitioners had failed to file their amended state returns within 120 days of being granted a federal refund pursuant to MCL 206.325(2). On appeal, the Tax Tribunal granted petitioners' motion for summary disposition, and the department appealed.

The Court of Appeals *held*:

1. MCL 205.27a(2) prohibits a taxpayer from claiming a refund of any amount paid to the department more than four years after the date set for filing the original return. However, MCL 205.27a(3)(a) suspends the running of this four-year limitations period while a final determination of tax is pending and for one year after that. MCL 205.27a(2) and MCL 205.27a(3) are not alternative provisions; they apply consecutively if a taxpayer pursues a final determination of tax liability. Under this analysis, petitioners had until December 6, 2003, to file their amended state returns with respect to the 1997 tax year, which made their filing on February 4, 2003, timely. With respect to the earlier tax years, the 1997 losses could be carried back to tax years 1994, 1995, and 1996 under the carry-back provisions of MCL 206.30(1) because the limitations period was open for 1997.

2. Petitioners' claim was not barred by MCL 206.325(2), which requires a taxpayer to file an amended return with the department showing any final alteration in or modification of the taxpayer's

federal income tax return that affects the taxpayer's taxable income under part 1 of the Income Tax Act, MCL 206.1 through MCL 206.532, within 120 days of the alteration or modification. Interpreting MCL 206.325(2) as a filing requirement (with potential penalties for late filing) rather than a separate and superseding statute of limitations renders it harmonious with MCL 205.27a(2), which provides no limitation except the four-year limitations period.

Affirmed.

1. TAXATION — CLAIMS FOR TAX REFUNDS — STATUTES OF LIMITATIONS — FINAL DETERMINATIONS OF TAX.

MCL 205.27a(2) prohibits a taxpayer from claiming a refund of any amount paid to the Department of Treasury more than four years after the date set for filing the original return; MCL 205.27a(3)(a) suspends the running of this four-year limitations period while a final determination of tax is pending and for one year after that; MCL 205.27a(2) and MCL 205.27a(3) apply consecutively if a taxpayer pursues a final determination of tax liability.

2. TAXATION — AMENDMENTS OF TAX RETURNS — ALTERATIONS OR MODIFICATIONS OF FEDERAL TAX RETURNS — 120-DAY FILING REQUIREMENT.

MCL 206.325(2) requires a taxpayer to file an amended return with the Department of Treasury showing any final alteration in or modification of the taxpayer's federal income tax return that affects the taxpayer's taxable income under part 1 of the Income Tax Act, MCL 206.1 through MCL 206.532, within 120 days of the alteration or modification; the 120-day filing requirement is not a separate statute of limitations that supersedes the four-year limitations period set forth in MCL 205.27a(2).

Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C. (by *Eric J. Gould* and *David A. Lawrence*), for petitioners.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Heidi L. Johnson-Mehney*, Assistant Attorney General, for respondent.

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM. Respondent appeals a decision of the Tax Tribunal in favor of petitioners regarding their claim for a tax refund. We affirm.

This dispute arises out of the United States Supreme Court's decision in *Gitlitz v Internal Revenue Comm'r*, 531 US 206; 121 S Ct 701; 148 L Ed 2d 613 (2001). Pursuant to the holding in *Gitlitz*, petitioners were entitled to claim an additional loss from the discharge of indebtedness by their S corporation. On August 14, 2001, petitioners filed federal claims for a refund, and on November 5, 2001, the Internal Revenue Service notified petitioners that the claims had been accepted, that their accounts for tax years 1994 through 1997 were changed, and that petitioners were entitled to a federal refund.

On February 3, 2003, petitioners filed amended state returns for tax years 1994 through 1997. On January 23, 2006, respondent issued notices denying petitioners refunds on the grounds that the amended claims had been filed outside the applicable period of limitations. Petitioners requested and were granted an informal conference with respondent, which was held on August 22, 2007. Following the conference, respondent's hearing referee recommended that petitioners' claims be denied, concluding that the period of limitations had been suspended by the federal claims but that the suspension period ended one year after November 5, 2001, and that petitioners' amended state claims were therefore untimely. On January 25, 2008, respondent accepted the referee's recommendation on other grounds, ruling that petitioners' federal claim did not toll the applicable period of limitations and that petitioners had failed to file their amended state returns within 120 days of being granted a federal refund as mandated by law.

Petitioners appealed in the Tax Tribunal. The tribunal ruled that petitioners' federal claim suspended the period of limitations while a final determination of petitioners' tax liability was pending and for a period of one year thereafter. Accordingly, petitioners' state claims were not untimely. The tribunal also concluded that the 120-day rule cited in respondent's decision and order of determination was merely a filing requirement, not a statute of limitations, and therefore did not override petitioners' right to a timely filed claim for a refund.

Turning first to whether petitioners' claim for a refund was timely filed under MCL 205.27a(2), this Court has previously addressed that issue in *Fegert v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2006 (Docket No. 270236). *Fegert* involved a nearly identical situation arising out of the *Gitlitz* decision and the filing of amended federal and state tax returns, with only minor differences in the relevant dates. We are persuaded by the analysis in the *Fegert* decision and adopt it as our own. *Fegert*, unpub op at 2-3, opined as follows:

> Petitioners argue that the [Tax Tribunal] misinterpreted the tolling provisions in MCL 205.27a. Resolution of this issue requires application of the undisputed facts to the relevant provisions of MCL 205.27a. Consequently, our review is de novo. *Cruz v State Farm Mut Ins Co.*, 466 Mich 588, 594; 648 NW2d 591 (2002). In addition, we review de novo the grant or a denial of a motion for summary disposition. *Spiek v Dept of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).
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> MCL 205.27a(2) provides in relevant part:
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> "The taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return."
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> However, this four year limitations period may be "suspended" or tolled. MCL 205.27a(3)(a) provides:

"(3) The running of the statute of limitations is suspended for the following:

"(a) The period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period."

Petitioners contend that the [Tax Tribunal], in determining the time periods for timely filing petitioners' claim for a refund, improperly interpreted these two provisions. We agree. The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). If the statutory language is clear and unambiguous, the court must apply the statute as written, and judicial construction is neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Although in general, a court will defer to the interpretation of statutes by the [Tax Tribunal] that the [tribunal] is delegated to administer, *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 221; 713 NW2d 734 (2006), when the language is clear, there is no need for interpretation and the statute must be applied as written.[1]

Petitioners filed their tax return on October 15, 1998. Accordingly, MCL 205.27a(2) permitted them to file a claim for a tax refund until October 15, 2002. However, MCL 205.27a(3)(a) provides that this four-year limitation period

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[1] We note that after the *Fegert* decision, the Michigan Supreme Court clarified that the standard is not to give deference to the agency's interpretation of a statute, but to give it " 'respectful consideration' " and that there should be " 'cogent reasons' " for overruling an agency's interpretation. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935). But this difference did not affect the *Fegert* decision because it did not follow the Tax Tribunal's interpretation.

> is suspended "pending a final determination of tax" and "for one year after that period."
>
> During the four-year limitation period, from October 15, 1998, to October 15, 2002, petitioners filed a claim for a refund of their federal taxes on August 12, 2001. On the date of filing, 1,031 days of the 1,461 days of the four-year limitation period had run. The IRS granted the refund 57 days later on October 8, 2001. The four year limitations period was suspended during those 57 days, as well as "for 1 year after that period," until October 8, 2002. MCL 205.27a(3)(a). The limitation period then ran for the 430-day balance of the 1,461-day limitation period, ending on December 12, 2003. Thus, pursuant to the plain language of the statute, petitioners' claim for a state refund was timely filed on March 20, 2003.
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> [The Tax Tribunal's] interpretation in its summary disposition order violates the plain language of the statute. In essence, the [Tax Tribunal] inserts an "or" between subsections (2) and (3) [of MCL 205.27a]. However, subsection[s] (2) and (3) are not alternative provisions; they are consecutive provisions if a taxpayer pursues a final determination of tax liability. Further, the [Tax Tribunal] inserts the phrase "whichever is later" to determine which provision to apply. As written, subsection (3) simply suspends the four-year limitation period pending a final determination of tax liability and for an additional year thereafter.

Under the *Fegert* analysis, petitioners in this case had until December 6, 2003, to file their amended state returns with respect to the 1997 tax year. The filing on February 3, 2003, was within this time frame and, therefore, timely. With respect to the earlier tax years, the tribunal concluded that, in light of the carry-back provisions of MCL 206.30(1), the losses in 1997 could be carried back to tax years 1994, 1995, and 1996, provided that the limitations period is open for 1997, which it is. Respondent does not challenge this aspect of the tribunal's ruling.

Respondent does, however, raise an issue not addressed in *Fegert*. Respondent argues that petitioners' claim is barred by MCL 206.325(2), which currently[2] reads as follows:

> A taxpayer shall file an amended return with the department showing any final alteration in, or modification of, the taxpayer's federal income tax return that affects the taxpayer's taxable income under this part and of any similarly related recomputation of tax or determination of deficiency under the internal revenue code. If an increase in taxable income results from a federal audit that increases the taxpayer's federal income tax by less than $500.00, the requirement under this subsection to file an amended return does not apply but the department may assess an increase in tax resulting from the audit. *The amended return shall be filed within 120 days after the final alteration, modification, recomputation, or determination of deficiency.* If the [Department of Treasury] finds upon all the facts that an additional tax under this part is owing, the taxpayer shall immediately pay the additional tax. If the department finds that the taxpayer has overpaid the tax imposed by this act, a credit or refund of the overpayment shall immediately be made as provided in section 30 of 1941 PA 122, MCL 205.30. [Emphasis added.]

Under respondent's interpretation of this provision, failure to file an amended return within 120 days results in the loss of a right of claim, whether or not the applicable limitations period remains open. This interpretation is at clear odds with MCL 205.27a(2), which provides no limitation except the four-year limitations period in cases of this sort. As the Tax Tribunal concluded, a more harmonious interpretation of MCL 206.325(2) is to view it as a mere filing requirement and not as a separate and superseding statute of limitations as respondent asserts. When MCL 206.325(2) is read

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[2] The changes made to this provision by 2011 PA 38, which took effect on January 1, 2012, do not affect our analysis.

this way, petitioners may be subject to a penalty for failure to file their amended return in a timely fashion, but petitioners' claim itself is not barred as untimely.

Affirmed. Petitioners may tax costs.

SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ., concurred.

HOWARD v KOWALSKI

Docket No. 297066. Submitted October 5, 2011, at Grand Rapids. Decided May 29, 2012, at 9:05 a.m. Amended, 296 Mich App 801. Leave to appeal sought.

Joedeanna Howard filed an action in the Wexford Circuit Court against Robert F. Kowalski, M.D., Trinity Health-Michigan, doing business as Mercy Hospital, and others, claiming that her decedent, Barbara Johnson, passed away because of Kowalski's negligent medical treatment in the emergency room. Johnson had been bitten in the face by one of her mares while assisting in the birth of a foal. Kowalski assessed and treated Johnson in the emergency room and requested the assistance of an anesthesiologist and an ear, nose, and throat (ENT) specialist to help manage her airway. Johnson was initially relatively stable, then experienced problems breathing after Kowalski had been called away for another emergency. The anesthesiologist, Dr. Charles Urse, and the ENT performed a cricothyroidotomy to ventilate her lungs directly, but Johnson suffered a cardiac arrest, resulting in permanent brain damage and her ultimate death. Plaintiff's theory of the case was that Urse was not present and assistance was not summoned until after Johnson's condition deteriorated suddenly and that Kowalski had negligently failed to intubate Johnson before being called away and leaving Johnson unattended. The court, William M. Fagerman, J., denied plaintiff's request to admit an affidavit of a nonparty doctor-witness (Urse) for impeachment purposes, concluding that it was hearsay, and excluded presuit correspondence, including e-mails, concerning the affidavit between plaintiff's attorney and a representative of Urse's insurer, but allowed plaintiff's counsel to refer to the affidavit during his opening statement and cross-examine Urse regarding its content, and argue during closing that it showed the defense's case was fabricated. Following the trial, the jury returned a verdict of no cause of action and plaintiff appealed.

The Court of Appeals *held*:

1. Under MRE 613(b), a prior inconsistent statement of a witness is admissible to impeach the credibility of the witness. The rule excluding hearsay, MRE 802, does not apply to the admission of a prior inconsistent statement because it is not offered as

substantive evidence to prove the truth of the matter asserted, MRE 801(c), but is only offered to test the credibility of the witness's testimony in court.

2. The party seeking to impeach a witness with a prior inconsistent statement must lay a foundation by establishing that the witness made the prior statement and that the prior statement was inconsistent with the witness's in-court testimony. A statement is inconsistent if there is any material variance between the testimony and the previous statement, that is, if a jury could reasonably find that a witness who believed the truth of the facts testified to would be unlikely to make the prior statement. Evidence is not collateral, and is thus admissible for impeachment purposes, if the fact on which the prior self-contradiction was predicated could have been shown in evidence for any purpose independently of the self-contradiction. The circuit court correctly allowed the jury to decide the issue of whether the affidavit was inconsistent with Urse's testimony but erred by refusing to admit the document itself into evidence. The affidavit was not collateral and should have been admitted because it detailed Urse's activities leading up to Johnson's deterioration independently of its tendency to impeach him.

3. Logical relevance is the foundation for admissibility. Under MRE 401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 402 provides that all relevant evidence is admissible except as otherwise provided. When the relevancy of evidence depends on the fulfillment of a condition of fact, the evidence must be admitted upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition. Under MRE 104(b), a court must examine all the evidence in the case and decide whether the jury could reasonably find the conditional fact by a preponderance of the evidence. The credibility of a witness is almost always relevant because the jury is entitled to all evidence that might bear on the accuracy and truth of a witness's testimony. The circuit court erred by excluding the e-mails between plaintiff's counsel and Urse's insurance claims representative. The evidence was relevant because it could be read as explaining the affidavit's contents and why it was inconsistent with Urse's trial testimony. The evidence was sufficient to allow a reasonable jury to find the conditional fact and conclude that Urse's testimony differed markedly from his affidavit. The error was not harmless because the improperly excluded

evidence might have affected the jury's determination regarding the credibility of Urse, who was a critical witness.

Reversed and remanded for further proceedings.

1. EVIDENCE — IMPEACHMENT — PRIOR INCONSISTENT STATEMENTS.

Under MRE 613(b), a prior inconsistent statement of a witness is admissible to impeach the credibility of the witness; the rule excluding hearsay, MRE 802, does not apply to the admission of a prior inconsistent statement because it is not offered as substantive evidence to prove the truth of the matter asserted, MRE 801(c), but is only offered to test the credibility of the witness's testimony in court; the party seeking to impeach a witness with a prior inconsistent statement must lay a foundation under MRE 613(b) by establishing that the witness made the prior statement and that the prior statement was inconsistent with the witness's in-court testimony; a statement is inconsistent if there is any material variance between the testimony and the previous statement, that is, if a jury could reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make the prior statement; evidence is not collateral, and is thus admissible for impeachment purposes, if the fact on which the prior self-contradiction was predicated could have been shown in evidence for any purpose independently of the self-contradiction.

2. EVIDENCE — RELEVANCE — CONDITION OF FACT.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence; all relevant evidence is admissible unless otherwise provided, but when the relevancy of evidence depends on the fulfillment of a condition of fact, the evidence must be admitted upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition; a court must examine all the evidence in the case and decide whether the jury could reasonably find the conditional fact by a preponderance of the evidence (MRE 104[b], 401, 402).

Allan Falk, P.C. (by *Allan Falk*), and *Weiner & Associates, P.C.* (by *Cyril V. Weiner*), for Joedeanna Howard.

Plunkett Cooney (by *Robert G. Kamenec*) for Robert F. Kowalski, M.D.

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM. Plaintiff appeals by right a judgment of no cause of action in this medical malpractice case, asserting that certain evidentiary rulings resulted in the denial of a fair trial. Specifically, plaintiff contends that the trial court abused its discretion by not admitting as an exhibit for impeachment purposes an affidavit of a nonparty doctor-witness and by excluding presuit correspondence concerning the affidavit between plaintiff's attorney and a representative of the witness's insurer. We conclude the trial court abused its discretion and that the error was not harmless. We reverse and remand.

I. FACTUAL BACKGROUND

Plaintiff's decedent, Barbara Johnson, a horse owner, was severely bitten in the face by one of her mares while assisting in the birth of a foal. Although the bite resulted in deep gashes below her right eye and along her jaw that caused heavy bleeding, Mrs. Johnson managed to call for an ambulance and also called her daughter. The decedent was transported to the emergency room (ER) of the defendant hospital, arriving at about 2:38 p.m., according to the emergency medical services report. Defendant, Robert F. Kowalski, M.D., the physician on duty in the ER at the time, assessed Mrs. Johnson at about 2:45 p.m., finding that she was alert and oriented. There was bleeding into her mouth, but her airway was open and being maintained by the suctioning of blood as needed.

Dr. Kowalski testified that between 2:50 and 2:52 p.m., he requested the assistance of an ENT[1] and

[1] A doctor specializing in the treatment of the ear, nose, and throat is an ENT or otolaryngologist.

ananesthesiologist "STAT" to help manage Mrs. Johnson's airway and that a medical helicopter be summoned to transport her to a larger hospital with better trauma treatment capability. Dr. Charles Urse, an anesthesiologist, responded, and shortly thereafter Dr. Lisa Jacobson, an ENT specialist, also responded to the "STAT" call for assistance. Both Drs. Kowalski and Urse testified in their pretrial depositions and at trial that Mrs. Johnson had been relatively stable when they were at her bedside discussing the best medical procedure to maintain the patency of her airway. About 3:00 p.m., Dr. Kowalski was called away to another emergency room patient who had gone into cardiac arrest. Thereafter, at about 3:05 p.m., Mrs. Johnson began having more serious difficulty breathing, crying out that she could not breathe. Dr. Urse administered medications and attempted to orally intubate Mrs. Johnson, but the amount of blood in her mouth and throat made it impossible. Dr. Urse, with Dr. Jacobson's assistance, performed a cricothyroidotomy to ventilate the patient's lungs by inserting breathing tubes directly through her throat. The procedure was only partially successful, and Mrs. Johnson suffered a cardiac arrest. She was resuscitated and placed on life support, but she had sustained permanent brain damage. Five days later, she was removed from life support and died.

Plaintiff's theory of the case was that when Dr. Kowalski left Mrs. Johnson to attend the other patient, Dr. Urse was not present and assistance was not summoned until after Mrs. Johnson's condition suddenly deteriorated. Plaintiff contended that Dr. Kowalski was negligent by failing to immediately intubate Mrs. Johnson before being called away to the other patient and leaving Mrs. Johnson unattended. According to plaintiff's theory, Dr. Urse had not arrived until after the patient's fatal deterioration began at about 3:05

p.m. Dr. Urse then took steps to intubate Mrs. Johnson, but blood in her mouth and throat prevented him from completing the procedure. Dr. Urse then performed a cricothyroidotomy with Dr. Jacobson's assistance. This too was not completely successful because Mrs. Johnson went into cardiac arrest and suffered loss of oxygen to the brain. Plaintiff's counsel formed this theory of the case during the presuit notice-of-intent period, MCL 600.2912b, apparently on the basis of his review of the medical records.

Plaintiff's counsel named Dr. Urse as a potential defendant in plaintiff's notice of intent, MCL 600.2912b, but did not name him in the complaint. On July 26, 2007, counsel wrote to Nancy A. Croze, a claims representative for Dr. Urse's liability insurer, American Physicians Assurance Corporation, advising her that on the basis of his understanding of the facts, Dr. Kowalski bore sole responsibility for the medical accident. After setting forth his understanding of the facts of the case, plaintiff's counsel indicated that he was planning to file a lawsuit only against Dr. Kowalski, assuming that his information was accurate. Counsel stated in his letter that he needed "some kind of verification perhaps in the form of an affidavit by Dr. Urse" that would confirm his understanding of the facts and that counsel "could draft such an affidavit."

Following the July 26, 2007, letter and other communications with plaintiff's counsel, which included e-mails, Croze wrote to counsel on August 15, 2007, enclosing Dr. Urse's August 9, 2007, affidavit. Croze stated in her letter: "I am confident that this document will meet your needs as you assess your intentions for pursuit of the case."

In pertinent part, two paragraphs of the affidavit stated:

> 4. I was contacted, by beeper or through the [operating room] front desk staff (I can't recall completely which one) in regards to a STAT ER page on patient Barbara Johnson on the afternoon of April 4, 2005. Then I immediately proceeded to the [post anesthesia care unit] to obtain the anesthesia department airway box, and then immediately proceeded to the Emergency Room, arriving within approximately two to three minutes after I was notified.
>
> 5. That my findings and treatment are summarized in my hand-written progress note contained in the medical record.

At trial and in his deposition 18 months earlier, Dr. Urse testified contrary to plaintiff's theory of the case that he was, in fact, at Mrs. Johnson's bedside discussing treatment options with Dr. Kowalski while the patient was stable and before Dr. Kowalski was called away. Dr. Urse further testified that his one-page progress note did not include the events preceding the patient's acute deterioration and that he signed his affidavit believing that the information desired was the time frame it took for him to arrive at the ER after receiving the stat page. He testified that he never saw the correspondence between plaintiff's counsel and Croze.

Two weeks before trial, the trial court heard and granted defendants' motion for a protective order regarding plaintiff's effort to subpoena Croze and her file. During the hearing, the court suggested, without deciding, that the Urse affidavit could arguably be used at trial as a prior inconsistent statement to impeach Dr. Urse's testimony.

On the first day of trial, after a jury had been selected and sworn, plaintiff's counsel sought a ruling from the court on the admissibility and use of Dr. Urse's affidavit and the correspondence between plaintiff's counsel and Croze. Counsel argued that plaintiff's "whole case

rest[ed] upon the medical records which contradict the testimony" of Drs. Urse and Kowalski that they were both present with Mrs. Johnson before the onset of fatal respiratory distress. Plaintiff's counsel agreed that use of the affidavit would be limited to impeaching the anticipated trial testimony of Dr. Urse and that the letters were intended only to provide context for the affidavit. With respect to the letters, the court ruled that it would not permit reference to them in opening statements but would not preclude their use at trial "if a proper foundation is laid" that Dr. Urse "in fact reviewed those letters and was in some way endorsing the facts that are contained therein at the time he executed the affidavit." Regarding the affidavit, the court ruled that it was hearsay and could not be used until Dr. Urse testified in a contrary manner. Nonetheless, defense counsel did not object to plaintiff's counsel's request to refer to the affidavit in his opening statement, without showing it, by saying "that [Dr. Urse] signed something which I believe is contrary to his testimony." In his opening statement, plaintiff's counsel stated:

> Now let's look at Dr. Urse who I believe you will see changed his position regarding what happened just like Dr. Kowalski did. Dr. Urse signed an affidavit when this lawsuit—before this lawsuit was filed and didn't say anything about being on the scene with Dr. Kowalski. We wanted to know, we have read the records, we want to know before the lawsuit; you weren't there, were you, Dr. Urse? He made no mention of having been there in his affidavit.
>
> * * *
>
> Again, Dr. Kowalski will testify contrary to the evidence in the chart that Dr. Urse, and Dr. Urse will change his testimony. When I say change, I mean he gave an affidavit before the case started, not mentioning this meeting [be-

> tween Dr. Urse and Dr. Kowalski] that supposedly occurred between 2:45 and 3:00. Dr. Urse will change his testimony . . . . And such testimony of Kowalski and Urse must be false or the record and Nurse Joel and everything we know about this case is wrong. There is no in between. . . . Dr. Urse will say he was in the room, and he was in the room with Dr. Kowalski until Dr. Kowalski was called out.
>
> The affidavit signed by Dr. Urse indicates nothing about him being in the room with Dr. Kowalski. Nothing. And we specifically inquired that question, that's what we wanted to know, who was in the room between 2:45 and 3:00. And we felt with that affidavit, that he had verified he was not initially in the room, but he testified in deposition contrary to that.

Dr. Urse testified at trial as discussed already. When asked, Dr. Urse recalled having signed his affidavit and he brought a copy to the trial. When plaintiff's counsel sought to display the affidavit to the jury, defense counsel objected that it was hearsay. Plaintiff argued that it was a prior inconsistent statement. The trial court suggested that counsel needed to lay a better foundation. When plaintiff's counsel asked Dr. Urse if his one-page progress note reflected the treatment he provided, Urse answered, "Yeah, it's a summary of events that occurred starting when she started to have respiratory distress" and "a summary of what had occurred that I thought was important." Dr. Urse identified a copy of the affidavit, identified his signature, and agreed that the affidavit was a notarized statement given under oath. Dr. Urse was asked to and read aloud ¶ 4 of the affidavit. At this point, the trial court suggested that the affidavit be marked, and it was marked as Exhibit 17. In an effort to establish the affidavit as a prior inconsistent statement, plaintiff's counsel asked Dr. Urse about ¶ 5 of the affidavit and about the content of his progress note. Counsel moved

for the admission of Exhibit 17, but the trial court ruled that it had not heard any testimony from Dr. Urse that was inconsistent with his affidavit.

On further cross-examination, Dr. Urse acknowledged that his progress note did not state all that he had done or all that occurred and that he had not thought it important to indicate that he had conferred with Dr. Kowalski regarding treatment options. He also admitted that he reviewed plaintiff's notice of intent and that he talked to a "legal representative" before signing the affidavit. But Dr. Urse denied ever seeing the correspondence at issue and explained that "I thought that when I filled out the affidavit, that you were asking me about when I got contacted and how long it took me to get down to the ER, that was my understanding, and that's what I wrote." Plaintiff's counsel noted that he did not ask that the affidavit be prepared, to which Dr. Urse replied, "[T]hat's what my legal representative said and I read it and I said that is what happened and I signed it."

The trial court ruled as follows regarding Exhibit 17:

> All right. To move this matter along, I'm going to rule that proposed 17 will not be received. I'm not precluding you from asking questions to the witness. I think you have done so, [plaintiff's counsel]. I do believe, however, that Dr. Urse read the portion that you referred him to somewhat meekly and it was difficult for me to hear and a couple of jurors were trying to get my attention while he was doing so. So for that reason, I will allow you to ask that question again. But that's going to be the Court's ruling as to the admissibility of 17.

After the trial court's ruling, plaintiff's counsel was allowed to require Dr. Urse to again read into the record ¶ 5 of his affidavit, which states: "That my findings and treatment are summarized in my hand-written progress note contained in the medical record."

Near the close of the proofs, plaintiff's counsel again sought to admit as rebuttal exhibits Dr. Urse's affidavit, counsel's July 26, 2007, letter, and Croze's August 15, 2007, letter. The trial court reasoned that there was no evidence that Dr. Urse knew of the letters or that he was responding in the affidavit to what plaintiff's counsel thought the facts were at the time he wrote his letter. The trial court also noted that the content of the affidavit was not contrary to Dr. Urse's testimony, either at trial or in his deposition. Therefore, the trial court ruled:

> The Court will stick with its prior ruling as it relates to Proposed Exhibit 17. The statement has been used for the extent that it was able to for purposes of impeachment. MRE 613 permits that and I permitted you to do that.
>
> * * *
>
> The plaintiffs have had an adequate opportunity to cross examine Dr. Urse, to lead him as it was put, because he was adverse to them, and the Court was lenient with that, as well as [defense counsel] did not object frequently as it relates to that. That was all part of the plaintiff's case in chief, and I'm not going to permit that testimony to be offered, and I will deny the request.

When queried by plaintiff's counsel regarding referring to the affidavit in his closing argument, the trial court advised:

> It's part of the record. You can argue it. You can argue that he provided an affidavit, that his findings and treatment are summarized in the handwritten progress notes contained in medical records. He told you, members of the jury, that he signed an affidavit to that effect, and you can argue that those medical records are the true story and that what he said from the stand is not the true story, and that will be for the fact finder to agree or disagree with you.

Following the trial court's advice, and as he did in his opening statement, plaintiff's counsel argued that the defense in this case was fabricated, that Dr. Urse's affidavit indicated that there was no meeting between Dr. Urse and Dr. Kowalski, and that Dr. Urse did not come to Mrs. Johnson's room between 2:53 and 3:00 p.m. as the two doctors testified.

The trial court instructed the jury regarding a prior inconsistent statement of a witness according to M Civ JI 3.15 as follows:

> If you decide that a witness said something earlier that is not consistent with what the witness said at trial, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case; however, there are exceptions. You may consider an earlier statement as proof of facts in this case if the statement was made by plaintiff, defendant, or an agent or employee of either party; the statement was given under oath subject to the penalty of perjury in a deposition; or the witness testified during the trial that the earlier statement was true.

As noted already, the jury returned a verdict of no cause of action. Plaintiff now appeals by right.

II. STANDARD OF REVIEW

A trial court's decision regarding the admission or exclusion of evidence will not be disturbed on appeal absent an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). But questions of law underlying a trial court's evidentiary decision, such as the construction of a constitutional provision, rule of evidence, court rule, or statute, are reviewed de novo. *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007); *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Even if a trial court's decision

regarding the admission or exclusion of evidence is an abuse of discretion because it is outside the range of principled outcomes, reversal is not warranted unless a substantial right of a party is affected, MRE 103(a), or it affirmatively appears that failure to grant relief is inconsistent with substantial justice, MCR 2.613(A). *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003).

III. ANALYSIS

Plaintiff argues that the trial court abused its discretion by not admitting Dr. Urse's affidavit in evidence as Exhibit 17. Plaintiff further argues that the trial court abused its discretion by failing to admit the letters exchanged between plaintiff's counsel and the insurance claims representative, Croze. Plaintiff contends that when read together, the contents of the documents diverge from the testimony of the witness and therefore constitute prior inconsistent statements. Because they are inconsistent, plaintiff argues, the trial court should have admitted them for impeachment purposes.[2] We agree.

A. THE TRIAL COURT ERRED BY EXCLUDING THE AFFIDAVIT

The trial court's ruling on the affidavit was ambiguous at best. MRE 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an

[2] We note that MRE 411 plays no role in this decision. MRE 411 does not preclude evidence of liability insurance if introduced for relevant reasons other than proving that a person acted negligently or otherwise wrongfully. Dr. Urse is not a party to this action. The communications between plaintiff's counsel and the claims representative for Dr. Urse's insurer are admissible because they bear on Dr. Urse's credibility as a witness, not on his conduct on the day in question.

> opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

MRE 613(b) recognizes that a prior inconsistent statement of a witness is admissible to impeach the credibility of the witness. *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998); *Gilchrist v Gilchrist*, 333 Mich 275, 280; 52 NW2d 531 (1952). If admitted, a prior inconsistent statement of a witness is not regarded as coming within the rule excluding hearsay, MRE 802, because it is not offered as substantive evidence to prove the truth of the matter asserted, MRE 801(c), but is only offered to test the credibility of the witness's testimony in court. *Merrow*, 458 Mich at 631; *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009). But a party seeking to impeach a witness with a prior inconsistent statement must satisfy the foundational criteria provided in MRE 613(b). *Barnett*, 478 Mich at 165; *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). One criterion for admissibility of a prior inconsistent statement, not disputed here, is that the witness actually made the prior statement. *Merrow*, 458 Mich at 631-632. Another criterion for admissibility of a prior inconsistent statement under MRE 613 is that the prior out-of-court statement of the witness was in fact inconsistent with the witness's testimony in court. *Barnett*, 478 Mich at 165; *Gilchrist*, 333 Mich at 280.

The Michigan Rules of Evidence do not expressly prescribe a test for inconsistency. McCormick, Evidence (6th ed) § 34, pp 151-152 sets forth the prevailing view:

> Under the more widely accepted view, any material variance between the testimony and the previous statement suffices. The pretrial statement need "only bend in a different direction" than the trial testimony. For instance,

> if the prior statement omits a material fact presently testified to, which it would have been natural to mention in the prior statement, the statement is sufficiently inconsistent. The test ought to be: Could the jury reasonably find that a witness who believed the truth of the facts testified to would be unlikely to make a prior statement of this tenor? [Citations omitted.]

In this case, the trial court twice—once when plaintiff moved to admit the affidavit during her case-in-chief and once when counsel proffered the affidavit as rebuttal evidence—stated its belief that Dr. Urse's affidavit was not inconsistent with his trial testimony. If that were so, the affidavit would be irrelevant to the witness's credibility and inadmissible hearsay for any other purpose. Consequently, if indeed there were no inconsistency between the affidavit and Dr. Urse's testimony, neither the affidavit nor its contents should have been admitted.

Nonetheless, the trial court obviously determined that even if the court did not, a reasonable jury might indeed perceive an inconsistency. The trial court allowed plaintiff's counsel the opportunity to cross-examine the witness on the affidavit. The trial court actually allowed the witness to read the affidavit to the jury, which, of course, is the same as admitting it. *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972). In reaching the decision to admit the contents of the affidavit by means of its being read, but not the document itself, the trial court stated on the record its belief that MRE 613 applied: "The [affidavit] has been used for the extent it was able to for purposes of impeachment. MRE 613 permits that and I permitted you to do that." Thereafter, the trial court allowed plaintiff's counsel to discuss the contents of the "inadmissible" affidavit during closing argument. Finally, the trial

court actually instructed the jury regarding prior inconsistent statements. M Civ JI 3.15.

The only conclusion to be drawn is that the trial court determined that although the court was not convinced, a jury could reasonably find that the affidavit was in fact inconsistent with the witness' testimony, and the court left it for the jury to decide. In this sense, the court's decision was correct. But unless the affidavit were to be deemed collateral, the court clearly erred by refusing to admit the document itself.

The contents of the affidavit were clearly not about a collateral issue. As the trial court itself acknowledged, plaintiff's entire theory of the case was premised on the fact that the affidavit and medical records told the "true story" and that Dr. Urse "changed his position regarding what happened."

In *Osberry v Watters*, 7 Mich App 258, 262; 151 NW2d 372 (1967), the Court adopted Professor Wigmore's test to determine what extrinsic evidence is admissible for impeachment purposes:

> The test to determine whether contradictory evidence may be introduced is stated by Wigmore:
>
> "Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?" 3 Wigmore, Evidence (3d ed), § 1020, p 692, citing *People* v. *DeFrance*, 104 Mich 563 [62 NW 709 (1895)].

The facts contained in the affidavit that set forth Dr. Urse's activities leading up to Mrs. Johnson's rapid deterioration, independently of their tendency to impeach the witness, are relevant to the case. Not only "could" they "have been shown in evidence," they were shown in evidence by both parties to the suit. The affidavit was not collateral and therefore should have been admitted.

Of course, if our ruling ended here, the failure to admit the actual document would be harmless inasmuch as the trial court allowed the contents of the affidavit into evidence, allowed plaintiff's counsel to discuss its contents during closing argument, and instructed the jury to consider whether the affidavit contradicted Dr. Urse's testimony. The more difficult question involves the e-mail between plaintiff's counsel and the claims representative, Croze.

B. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF THE E-MAIL

With respect to the e-mail, the question presented is a simple one of logical relevance. Logical relevance is the foundation for admissibility. *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993). Logical relevance is defined by MRE 401 and MRE 402.

As defined by MRE 401, "relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible."

Plaintiff sought to impeach the credibility of Dr. Urse not only by introducing Dr. Urse's own prior and arguably inconsistent statement (the affidavit), but also by introducing communications between plaintiff's counsel and Croze for Dr. Urse's insurer. Plaintiff contends that the credibility of Dr. Urse's testimony can only be properly judged by viewing it in context. In effect, plaintiff argues, the e-mail explains the affida-

vit's contents and why they are inconsistent with Dr. Urse's trial testimony. If Dr. Urse was aware of the substance of the e-mail exchanged between Croze and plaintiff's counsel, the jury might have concluded that the phrasing of the affidavit was a deliberate attempt to obfuscate the central issue of the case. Similarly, even if Dr. Urse was unaware of the e-mail exchange, if the affidavit was nonetheless prepared by his insurer and he signed it at his insurer's direction, his testimony, while honest, might nonetheless lack credibility because the witness himself was misled and therefore the accuracy of both his affidavit and his trial testimony are suspect.

In a trial, the credibility of a witness is almost always relevant. *People v Layher*, 464 Mich 756, 761-764; 631 NW2d 281 (2001), citing with approval *United States v Abel*, 469 US 45; 105 S Ct 465; 83 L Ed 2d 450 (1984). The jury, as the finder of fact and judge of credibility, "has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *Abel*, 469 US at 52. Moreover, inasmuch as the questions posed to Dr. Urse arose during cross-examination, "[t]here is 'a general canon that on cross-examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very liberal*.' " *Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898 (1981), quoting 3A Wigmore, Evidence (Chadbourn rev), § 944, p 778.

Thus any evidence that Dr. Urse knew the contents of the e-mail, or was himself misled by his insurer, is clearly relevant and admissible to impeach his trial testimony. On this score, we have here a classic case of "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact . . . ." MRE 104(b). In such a case, "the court shall admit [the evidence] upon,

or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." *Id*. The e-mail exchanged between Croze and plaintiff's counsel are relevant for the reasons set forth earlier, but only if Dr. Urse was aware of the e-mail, or if not, was kept in the dark by his insurer.

It appears from the record that the trial court found "no evidence" that Dr. Urse knew of the e-mail. But the court apparently erred by deciding the question under subpart (a) of MRE 104, and not according to subpart (b). The standard for screening evidence under subpart (b) is quite low.

MRE 104(b) is identical to its federal counterpart. In *VanderVliet*, 444 Mich at 68, our Supreme Court, in deciding the applicable standard for MRE 104(b), specifically adopted the United States Supreme Court's holding in *Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988). In *Huddleston*, the government had charged the defendant with receiving stolen property and attempted to introduce evidence, pursuant to FRE 404(b), that the defendant had in the past received stolen television sets. The defendant denied ever having dealt with stolen television sets. Quoting *Huddleston*, our Supreme Court held:

> "[Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b) . . . . In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.
>
> * * *

> "We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. '[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.' *Bourjaily v United States*, 483 US 171, 179-180 [107 S Ct 2775; 97 L Ed 2d 144] (1987)." [*VanderVliet*, 444 Mich at 69 n 20, quoting *Huddleston*, 485 US at 688-691.]

As stated, as long as some rational jury could resolve the issue in favor of admissibility, the court must let the jury weigh the disputed facts. Specifically, the court must allow the jurors to assess the credibility of the evidence presented by the parties.

The sum of the evidentiary presentation in this case could lead a rational jury to find that Dr. Urse, either wittingly or unwittingly, participated in an effort to "sandbag" the plaintiff. It is impossible to ignore the timing and the substance of the e-mail between plaintiff's counsel and Croze.

As noted, plaintiff's counsel named Dr. Urse as a potential defendant in plaintiff's notice of intent, MCL 600.2912b. But on July 26, 2007, counsel wrote Croze and indicated that on the basis of his reading of the medical records, Dr. Kowalski bore sole responsibility for the medical accident because Dr. Kowalski failed to summon Dr. Urse in a timely fashion. After setting forth his understanding of the facts of the case, an understanding he gleaned from the medical records, plaintiff's counsel indicated that he was planning to file a lawsuit only against Dr. Kowalski, *assuming that his information was accurate*. Counsel stated in his letter that he needed "*some kind of verification perhaps in the form of an affidavit by Dr. Urse*" that would confirm his understanding of the facts and that counsel "could draft such an affidavit." (Emphasis added.)

Dr. Urse testified that he was shown the plaintiff's notice of intent, together with the proposed affidavit by a "legal representative." He then signed the affidavit.

On August 15, 2007, Croze sent the affidavit to plaintiff's counsel with the disarming note stating, "*I am confident that this document will meet your needs as you assess your intentions for pursuit of the case*." (Emphasis added.)

When viewed together, the sum of this evidence is sufficient to allow a reasonable jury to conclude that Dr. Urse's trial testimony differed markedly from his affidavit.

C. THE TRIAL COURT'S ERRORS WERE NOT HARMLESS

Because the improperly excluded evidence may have affected the jury's determination regarding the credibility of Dr. Urse, a critical witness, the error cannot be considered harmless. See *Powell v St John Hosp*, 241 Mich App 64, 72-75; 614 NW2d 666 (2000).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs under MCR 7.219 as the prevailing party.

MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ., concurred.

BUHALIS v TRINITY CONTINUING CARE SERVICES

Docket Nos. 296535 and 300163. Submitted November 9, 2011, at Detroit. Decided May 29, 2012, at 9:10 a.m. Leave to appeal denied, 493 Mich 901.

Mary Buhalis brought an ordinary negligence and premises liability tort action in the Macomb Circuit Court against Trinity Continuing Care Services for injuries suffered when she slipped and fell on ice after parking her tricycle in the patio area of a nursing home owned by Trinity that was adjacent to its main covered walkway and entrance. The court, Peter J. Maceroni, J., denied Trinity's second motion for summary disposition on Buhalis's first amended complaint in which she sought to hold Trinity liable for ordinary negligence. Trinity sought leave to appeal the circuit court order denying its second motion for summary disposition, which the Court of Appeals granted in an unpublished order, entered June 4, 2010 (Docket No. 296535). In the same docket number, Buhalis cross-appealed the circuit court order dismissing her premises liability complaint on the basis that the danger was open and obvious. Trinity also sought leave to appeal the circuit court order that denied its third motion for summary disposition on the basis that there was an issue of fact regarding Buhalis's alleged violation of MCL 125.471. The Court of Appeals granted leave to appeal in an unpublished order, entered May 18, 2011 (Docket No. 300163). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The gravamen of an action is determined by reading the complaint as a whole and looking beyond the mere procedural labels to determine the exact nature of the claim. Accordingly, courts are not bound by the labels that parties attach to their claims. Michigan caselaw distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. For claims premised on a condition of the land, liability arises solely from the defendant's duty as an owner, possessor, or occupier of the land. The action sounds in premises liability rather than ordinary negligence if the plaintiff's injury arose from an allegedly dangerous condition on the land, even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. The circuit court erred by denying

Trinity's motion for summary disposition of Buhalis's ordinary negligence claim because the action actually asserts a common-law premises liability claim; Buhalis's assertion that an employee caused the dangerous condition on the patio did not transform the claim into one for ordinary negligence.

2. The following elements of negligence must be proven in a premises liability action: (1) the defendant owed the plaintiff a duty, (2) the defendant breached the duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. A possessor of land is not an absolute insurer of an invitee's safety. An owner of land generally owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. In the absence of special aspects, this duty does not extend to open and obvious dangers. Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will remove that condition from the open-and-obvious-danger doctrine. The open-and-obvious-danger doctrine is not an exception to this general duty but is an integral part of the definition of that duty.

3. When dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless the invitor should anticipate the harm despite knowledge of it on behalf of the invitee. The hazard presented by snow and ice is generally open and obvious and the landowner has no duty to warn of or remove the hazard. If a condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open-and-obvious-danger doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. Recovery is not allowed if the condition is so common that the possibility of its presence is anticipated by prudent persons. The circuit court properly dismissed Buhalis's premises liability claim. Buhalis failed to establish a genuine issue of material fact with regard to whether the ice was open and obvious because she knew of the danger of ice on the patio and the presence of other indicia of a potentially icy condition would have alerted an average user of ordinary intelligence to discover the danger on casual inspection. Because Trinity provided a clear means of ingress and egress and Buhalis strayed off this path onto the patio that was obviously not reserved for that purpose, Trinity did not breach its duty of reasonable care. Reasonable minds could not disagree that Trinity exercised reasonable care because the

main walkways and sidewalks were clear and it was not unreasonable to not clear the ice or snow from the patios.

4. Trinity cannot be liable under MCL 600.5839 for an alleged defect in the design or construction of the roof of the building and the awning because it was unrebutted that Trinity neither designed nor constructed them.

5. Under Mich Admin Code, R 325.21304(2), nursing homes are required to maintain the premises in a safe and sanitary condition and in a manner consistent with the public health and welfare. Buhalis abandoned her claim under Rule 325.21304(2) because she failed to provide legal authority for her position that this regulation provides a private cause of action.

6. Under MCL 125.471 of the Housing Law of Michigan, MCL 125.401 *et seq.*, an owner has an obligation to maintain the roof of a dwelling and to appropriately drain the rain water. The circuit court erred by failing to dismiss Buhalis's claim premised on a violation of MCL 125.471. Assuming, without deciding, that MCL 125.471 applies to Trinity's facility and to a guest of an occupant, the statute does not provide an independent cause of action. Although the statute imposes an obligation to maintain a dwelling's roof and to drain rain water, the duty is imposed to avoid dampness in the walls as well as insanitary conditions. The statute does not impose a duty to remove snow and ice on the grounds outside the dwelling.

7. The circuit did not err by dismissing Buhalis's claim premised on MCL 554.139(1), which requires a landlord to ensure that the premises and all common areas are fit for their intended use. The duty imposed by MCL 554.139(1) does not extend to the social guests of tenants.

Affirmed in part, reversed in part, and remanded for entry of summary disposition in favor of Trinity on all issues in both dockets.

M. J. KELLY, P.J., concurring in part in the result only and dissenting in part, agreed that the circuit court erred by denying Trinity's motion to dismiss Buhalis's ordinary negligence claim and that the circuit court properly dismissed Buhalis's statutory and regulatory claims. Judge KELLY would have reversed the circuit court order granting Trinity summary disposition on Buhalis's premises liability claim because there was a question of fact regarding whether Trinity had a duty to warn or protect her from the hazards of snow and ice on the patio. Judge KELLY would have found that the ice was not open and obvious and there was a

question of fact regarding whether Buhalis was an invitee or trespasser at the time she slipped and fell on the patio.

1. NEGLIGENCE — PREMISES LIABILITY — DANGEROUS CONDITION OF THE LAND.

Michigan caselaw distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land; for claims premised on a condition of the land, liability arises solely from the defendant's duty as an owner, possessor, or occupier of the land; an action sounds in premises liability rather than ordinary negligence if the plaintiff's injury arose from an allegedly dangerous condition on the land, even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury.

2. NEGLIGENCE — PREMISES LIABILITY — OPEN-AND-OBVIOUS-DANGER DOCTRINE — SPECIAL ASPECTS.

A possessor of land is not an absolute insurer of an invitee's safety; an owner of land generally owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land; in the absence of special aspects, this duty does not extend to open and obvious dangers; only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will remove that condition from the open-and-obvious-danger doctrine.

3. NEGLIGENCE — PREMISES LIABILITY — OPEN-AND-OBVIOUS-DANGER DOCTRINE — SNOW AND ICE — CLEAR MEANS OF INGRESS AND EGRESS.

When dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee; the hazards presented by snow and ice are generally open and obvious and the landowner has no duty to warn of or remove the hazard; if a condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open-and-obvious-danger doctrine will cut off liability if the invitee should have discovered the condition and realized its danger; recovery is not allowed if the condition is so common that the possibility of its presence is anticipated by prudent persons; a landowner's duty of reasonable care is not breached when a premises possessor provides a clear means of ingress and egress and the invitee strays off the normal pathway onto an area that is obviously not reserved for that purpose.

Cooper Law Firm, PLLC (by *John J. Cooper*), for Mary Buhalis.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *John P. Hessberg*) for Trinity Continuing Care Services.

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

SAAD, J.

I. NATURE OF THE CASE

Under Michigan law, a premises possessor generally owes no duty to an invitee to warn of or protect from open and obvious dangers, such as ice and snow, absent special aspects. We hold that, for the reasons set forth below, the icy condition that plaintiff encountered was open and obvious. We also hold that, as a matter of law, if a premises possessor provides a clear means of ingress and egress and an invitee strays off the normal pathway onto an area that is obviously not reserved for that purpose, the landowner has not breached its duty of "reasonable care." When a pathway for normal access is made available to an invitee and the dangers of straying off the clear path are, as here, open and obvious, the premise possessor owes no duty to warn or protect such an invitee.

II. FACTS

In January 2008, plaintiff, Mary Buhalis, slipped and fell on ice on a patio near the front entrance of a building owned by defendant, Trinity Continuing Care Services. On the morning of the incident, Ms. Buhalis rode a large, three-wheeled tricycle to the nursing home to donate a bag of clothes. She parked her

trike on the uncleared and unsalted patio adjacent to the main entrance walkway, which was free of ice and snow and covered by a large awning. After she dismounted her trike, Ms. Buhalis retrieved the bag of clothes from the basket on the trike and set it on the ground. She then picked up the bag and, as she started to walk toward the building, she slipped and fell. Ms. Buhalis offered conflicting testimony about the precise location of her fall, but receptionist Marlene Calcaterra testified that she saw Ms. Buhalis attempting to get up from the ground right outside her window, which is directly in front of the patio. At oral argument on appeal, plaintiff's counsel agreed that Ms. Buhalis fell on the patio and not on the cleared walkway leading to the building.

Joshua Shock, the maintenance technician for the nursing home, testified that part of his job is to remove snow and place salt on the walkways and entrance areas of the building. Mr. Shock testified that the sidewalks and main entrance walkway were clear of ice and snow when Ms. Buhalis fell. He further testified that he never salted or removed ice from the patios and that generally they were not maintained during the winter months. According to Mr. Shock, the large awning over the main walkway "performed as designed, in directing rain and melting snow and ice away from the covered walkway and entrance to the building, and onto the uncovered cement patio areas adjacent to each side of the awning." Mr. Shock recalled that on the day Ms. Buhalis fell, there was visible ice on the patio in the area where plaintiff slipped. According to Ms. Buhalis, she was aware that ice and snow could accumulate on the patio, that the awning caused water to fall onto the patio where it could freeze and thaw, and that Trinity had posted a sign that cautioned, "SIDE-

WALKS, PARKING LOTS AND COMMON AREAS MAY BE WET, SNOWCOVERED [sic] AND SLIPPERY," but Ms. Buhalis maintained that she did not see any ice on the patio before she slipped. However, Ms. Buhalis recalled that after she fell she saw that she had slipped on a patch of ice.

Ms. Buhalis sued Trinity, alleging various claims of liability. In Docket No. 296535, Trinity appeals by leave granted[1] the trial court's order that denied its second motion for summary disposition. Ms. Buhalis also filed a cross-appeal in Docket No. 296535. In Docket No. 300163, Trinity appeals by leave granted[2] the trial court's order that denied its third motion for summary disposition. The Court of Appeals consolidated the appeals. For the reasons set forth below, we affirm in part, reverse in part, and remand for entry of summary disposition for Trinity in Docket Nos. 296535 and 300163.

III. ORDINARY NEGLIGENCE

We agree with Trinity that the trial court erred when it denied its motion for summary disposition on Ms. Buhalis's first amended complaint, in which she asserted that Trinity should be held liable for ordinary negligence. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

Courts are not bound by the labels that parties attach to their claims. *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). Indeed, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere

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[1] *Buhalis v Trinity Continuing Care Servs*, unpublished order of the Court of Appeals, entered June 4, 2010 (Docket No. 296535).

[2] *Buhalis v Trinity Continuing Care Servs*, unpublished order of the Court of Appeals, entered May 18, 2011 (Docket No. 300163).

procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. *James*, 464 Mich at 18-19.

Here, Ms. Buhalis alleged that she was injured when she slipped on ice and fell; that is, she alleged that she was injured when she encountered a dangerous condition on Trinity's premises. Though she asserted that Trinity's employees caused the dangerous condition at issue, this allegation does not transform the claim into one for ordinary negligence. *Id.* Rather, she clearly pleaded a claim founded on premises liability. Therefore, Ms. Buhalis's negligence claim is a common-law premises liability claim and, to the extent that she purported to allege an ordinary negligence claim in addition to her premises liability claim, the trial court should have dismissed that claim.

IV. OPEN AND OBVIOUS DANGER AND DUTY OF REASONABLE CARE

On cross-appeal in Docket No. 296535, Ms. Buhalis argues that the trial court erred by granting Trinity's first motion for summary disposition regarding plaintiff's premises liability claim because Ms. Buhalis con-

tends the ice on which she fell was not open and obvious.[3]

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "[T]he existence of a legal duty is a question of law for the court to decide." *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). A "possessor of land is not an absolute insurer of the safety of an invitee." *Id*. Generally, an owner of land "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Absent special aspects, this duty does not extend to open and obvious dangers. *Id*. at 516-517. Moreover, "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id*. at 516.

"[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Indeed, there is an overriding public policy that people should "take reasonable care for their own safety" and this precludes

[3] The trial court subsequently set aside its order granting defendant's first motion for summary disposition, but on different grounds. The trial court did not alter its decision regarding this issue.

the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

"Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392; 740 NW2d 547 (2007). Here, Ms. Buhalis contends that the ice was not open and obvious because it was clear and she did not see it before she fell. However, if a "condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand*, 449 Mich at 611. A plaintiff may not recover if the condition is " 'so common that the possibility of [its] presence is anticipated by prudent persons.' " *Id*. at 615 (citation omitted).

In *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008), this Court explained: "When applying the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." Thus, the question is whether the ice was visible on casual inspection or whether there were other indicia of a potentially hazardous condition that would impute knowledge on the part of Ms. Buhalis. *Id*. at 483.

Here, Ms. Buhalis failed to establish a genuine issue of material fact with regard to whether the ice was open and obvious because, even if the ice could be fairly character-

ized as clear, Ms. Buhalis knew of the danger of ice on the patio and other indicia of a potentially icy condition would have alerted an average user of ordinary intelligence to discover the danger on casual inspection.

Evidence showed that it rained and snowed the day before plaintiff's fall. Though temperatures rose during the night before the incident, Ms. Buhalis admitted that after she fell she could see the patch of ice on which she slipped, and Mr. Shock testified that when he went to move Ms. Buhalis's trike after her fall the ice on the patio was evident. Further, at the time of her fall, Ms. Buhalis had lived through 85 Michigan winters. She testified that she knew that even when sidewalks are clear, there is danger of "black ice" on the ground. Ms. Buhalis also testified that she knew that water fell from the awning onto the patio and that ice may develop from a freeze-thaw cycle. She further stated that she had chosen to park her trike away from the awning because she knew there could be ice present from water runoff. Ms. Buhalis was also specifically aware of the caution sign warning that the common areas could be wet, snow-covered, and slippery, but she knowingly chose not to heed the warning and, thus, voluntarily exposed herself to the hazard. Again, while a premises possessor owes a duty to invitees to exercise reasonable care to protect the invitees from an unreasonable risk of harm, invitees have a concurrent and important duty to "take reasonable care for their own safety." *Bertrand*, 449 Mich at 616-617. For these reasons, the danger of ice was actually known to Ms. Buhalis and a reasonably prudent person in Ms. Buhalis's position would have foreseen the danger of slipping on ice. *Riddle*, 440 Mich at 96.[4]

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[4] Moreover, no special aspects existed that would have differentiated the icy condition from a typical open and obvious risk. "[O]nly those

We further observe that there is no question of fact with regard to whether Trinity exercised reasonable care to protect invitees from the dangers of ice and snow. The degree of care required of a premises possessor is to "take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [the plaintiff, but] only if there is some special aspect that makes such accumulation unreasonably dangerous." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004) (quotation marks omitted). See also *Benton*, 270 Mich App at 443 n 2 ("*Mann* established that there is no general duty of inviters to take reasonable measures to remove snow and ice for the benefit of invitees unless the accumulation meets the [*Mann*] majority's high standard of creating an unreasonable risk of danger.").

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special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, 464 Mich at 519. Thus, for example, an unguarded 30-foot-deep pit in a parking lot would present such a substantial risk of death or severe injury that it would be unreasonably dangerous to maintain the condition despite its obvious nature. *Id*. at 518. Also, an effectively unavoidable condition, such as the presence of standing water on the floor of the only exit in a commercial building, would present a special aspect to differentiate such a hazard from a typical open and obvious risk. *Id*. However, "[n]either a common condition nor an avoidable condition is uniquely dangerous." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 117; 689 NW2d 737 (2004) (GRIFFIN, J., dissenting), rev'd 472 Mich 929 (2005).

Here, the patio was clearly avoidable because Ms. Buhalis was not required to use it and, again, the main walkway to the front entrance was clear. Evidence also showed that a side entrance was available for visitors to use. Moreover, the presence of ice on the patio did not present such a substantial risk of death or severe injury that it was unreasonably dangerous to maintain the condition. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002). Accordingly, plaintiff has failed to establish that any special aspect existed that rendered the icy condition effectively unavoidable or unreasonably dangerous.

In other words, it is not Trinity's duty to guarantee that ice will never form on its premises, but it does have a duty to ensure that invitees are not unnecessarily exposed to an unreasonable danger.

Reasonable minds could not disagree that Trinity exercised "reasonable care." Trinity provided a sizeable, fully cleared walkway to its main entrance, covered by a large awning to protect the walkway from the elements. Mr. Shock also testified that all sidewalks surrounding the building were clear and free of ice and snow. It was not unreasonable for Trinity not to clear ice or snow from its seasonal patios. Again, during the winter, a premises possessor cannot be expected to remove snow and ice from every portion of its premises, including areas adjacent to a cleared walkway, and Michigan caselaw makes it clear that such extraordinary measures are not required. *Mann*, 470 Mich at 332; *Benton*, 270 Mich App at 443 n 2. Further, Trinity posted a caution sign warning that the area may be slippery. Trinity had no duty to clear every surface on which Ms. Buhalis, individually, may have chosen to park her trike, whenever she might visit, in whatever type of weather. And, there is no evidence that the patios were used by invitees throughout the winter. That Ms. Buhalis chose to stray from the safe means of ingress to and egress from the building does not impose liability on Trinity, when Trinity clearly complied with its duty of care to invitees.

V. DESIGN AND CONSTRUCTION

Trinity argues that Ms. Buhalis's claims that it defectively designed and constructed the roof of the building and the awning—even if those claims are distinct from the premises liability claim—are barred under MCL 600.5839. That statute protects "any con-

tractor making the improvement." MCL 600.5839(1). Because there is no evidence that Trinity designed or constructed the roof or the awning, that statute does not apply. For the same reason, Ms. Buhalis's design and construction claims fail. Trinity presented unrebutted evidence that it did not design or construct the improvements on the premises. In the absence of evidence that Trinity designed or constructed the improvements, Trinity cannot be liable for a defect in their design or construction. See MCR 2.116(C)(10).

VI. REGULATORY AND STATUTORY CLAIMS

We also reject Ms. Buhalis's claim that she has a cause of action under Mich Admin Code, R 325.21304(2), which requires nursing homes to maintain the premises in "a safe and sanitary condition and in a manner consistent with the public health and welfare." Ms. Buhalis presents no argument or authority that this regulation provides a private cause of action. See *Lash v Traverse City*, 479 Mich 180, 192-193; 735 NW2d 628 (2007) (setting forth the test for determining when a private right of action for damages can be inferred from a statute). And this Court will not search for authority to support or reject her position. See *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002). Therefore, we hold that Ms. Buhalis failed to establish that she had a viable claim under that regulation.

Further, were we to assume (without deciding) that MCL 125.471 applies to Trinity's facility and to a guest of an occupant, see MCL 125.401 (applying the housing law to certain classes of municipalities) and MCL 125.536 (stating that an occupant has a cause of action under the housing law), we hold that MCL 125.471 does not provide an independent cause of

action under the facts of this case. Although the statute imposes an obligation to maintain the roof of a dwelling and to drain rain water, it specifically provides that the duty is imposed to "avoid dampness in the walls and ceilings and insanitary conditions." *Id.* That is, it plainly does not impose a duty to remove snow and ice on the grounds outside the dwelling. And Ms. Buhalis did not otherwise allege that her injuries resulted from a failure to maintain the dwelling in good repair. See *Morningstar v Strich*, 326 Mich 541, 545; 40 NW2d 719 (1950) (holding landlord liable for injuries to tenant's child when injured by radiator that landlord had prior knowledge was defective). Accordingly, under these facts, the trial court should have dismissed Ms. Buhalis's claim to the extent that it relied on MCL 125.471.

There is also no merit to Ms. Buhalis's argument that the trial court erred when it dismissed her claim premised on the duty imposed on landlords under MCL 554.139(1). Our Supreme Court has held that MCL 554.139(1) does not apply to social guests of a tenant. See *Mullen v Zerfas*, 480 Mich 989, 990; 742 NW2d 114 (2007). Accordingly, MCL 554.139(1) does not apply.

VII. CONCLUSION

For the above reasons, the trial court should have granted summary disposition to Trinity on all of Ms. Buhalis's claims. In light of our resolution of these issues, we need not address the parties' remaining arguments.

Affirmed in part, reversed in part, and remanded for entry of summary disposition for defendant in Docket Nos. 296535 and 300163. We do not retain jurisdiction.

O'CONNELL, J., concurred with SAAD, J.

M. J. KELLY, P.J. (*dissenting*). Although I do not join its analysis, I concur with the majority's conclusions with regard to plaintiff Mary Buhalis's ordinary negligence claim as well as her statutory and regulatory claims. I must dissent, however, from the majority's decision to disregard settled premises liability law governing the duties owed by a premises possessor to his or her invitees. In a departure from Michigan's common law, the majority holds that—as a matter of law—a premises possessor owes no duty to diminish the hazard of ice and snow from its property beyond clearing a single path to and from its main entrance. For the first time in Michigan's jurisprudence, a premises possessor will have no duty to protect an invitee from a particular class of hazards; hazards that the premises possessor knows about, but that the invitee might not know or have reason to know about—that is, for the first time an invitee will be relegated to the legal status of a trespasser while in an area of a defendant's premises where he or she has not trespassed and where he or she is still, for all other purposes, an invitee. To this novel proposition, I cannot subscribe.

I conclude that Buhalis presented evidence that established a question of fact as to whether defendant, Trinity Continuing Care Services, impliedly invited her to use the patio to park her tricycle. Accordingly, she established a question of fact as to whether Trinity had a duty to clear the patio for her, as its invitee, and breached that duty. She also presented evidence from which a reasonable jury could have concluded that the ice at issue was not open and obvious. Because a jury had to resolve these factual questions, the trial court erred when it dismissed Buhalis's premises liability claim. I would reverse and remand for a trial on the merits.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to dismiss a claim under MCR 2.116(C)(10). *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

II. PREMISES LIABILITY

A. THE DUTY TO PROTECT INVITEES USING THE PATIO

On appeal, Trinity argues that it owed no duty to keep ice and snow from the patio because the patio was closed for the winter. The duty that a premises possessor owes to persons visiting his or her property is inextricably intertwined with the visitor's legal status while visiting the premises. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A premises possessor owes the highest duty to those persons that visit his or her property as invitees:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Id.* at 597, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 258; 235 NW2d 732 (1975), citing 2 Restatement Torts, 2d, § 343, pp 215-216.]

Typically, whether a premises possessor had a duty cognizable at law is a question of law to be decided by the courts. See *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992) (noting that the trial court must decide the threshold issue of duty of care in

a negligence action). However, "if there is evidence from which invitee status might be inferred, it is a question for the jury." *Stitt*, 462 Mich at 595; see also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

In this case, Buhalis, who was 86, testified that she liked to visit friends at Sanctuary at the Abbey, a nursing home owned and operated by Trinity. She said that she rode her three-wheeled cycle to the Abbey on the day at issue to deliver a bag of clothing for patients or friends. Therefore, there was evidence from which a reasonable jury could conclude that Buhalis was an invitee to those parts of the premises that visitors typically use. See *Stanley v Town Square Coop*, 203 Mich App 143, 147-148; 512 NW2d 51 (1993) (holding that a tenant's guests are invitees of the landlord because the landlord derives a pecuniary benefit from the consideration paid by the tenants in exchange for the right to invite guests); see also 2 Restatement Torts, 2d, § 332, comment g, p 180 (noting that those who "go to a hotel to pay social calls upon the guests or to a railway station to meet passengers or bid them farewell, are business visitors, since it is part of the business of the hotelkeeper and railway to afford the guest and passengers such conveniences"). But, as our Supreme Court has recognized, a visitor can lose his or her invitee status if he or she moves from an area open to invitees into an area that is not open to invitees. See, e.g., *Muth v W P Lahey's, Inc*, 338 Mich 513, 517-518; 61 NW2d 619 (1953) (holding that, although the plaintiff proceeded to go into the store's backroom to look for shoes, it was undisputed that the store's clerk had instructed her to do so and, as such, the plaintiff was still an invitee, not a mere licensee). Thus, if the patio was closed for the winter, Buhalis might not have been an invitee when she used the patio. Nevertheless, as our

Supreme Court explained approximately 80 years ago in *Nezworski v Mazanec*, 301 Mich 43; 2 NW2d 912 (1942), a visitor's status is a matter for the jury if there is evidence from which it could find that the visitor reasonably understood that he or she had the right to use the area at issue.

In *Nezworski*, the plaintiff had gone to the defendant's restaurant for a Christmas party. *Id.* at 51. The restaurant had two rooms, a larger room in the front and a smaller room in the rear. *Id.* at 48-49. There was a door in the rear room that led out to a narrow cement platform, which had been enclosed. On the east end of the platform there was another door that led out to an alley and on the west end there was a flight of stairs that led to the basement. *Id.* The plaintiff was using the rear room when she decided to get some fresh air and left through the rear door leading to the cement platform. As she stepped through the door she lost her balance and fell down the stairs. *Id.* at 51-52.

On appeal, the defendant argued that it owed the plaintiff no duty to warn or protect her because when the plaintiff went "through the doorway in the rear room and upon the cement platform leading to the alley," she became a trespasser. *Id.* at 58. In analyzing the issue, our Supreme Court explained that a premises possessor's duty can arise from an implied invitation to use the area at issue:

> "An implied invitation is one which is held to be extended by reason of the owner or occupant doing something or permitting something to be done which fairly indicates to the person entering that his entry and use of the property is consistent with the intentions and purposes of the owner or occupant, and leads him to believe that the use is in accordance with the design for which the place is adapted and allowed to be used in mutuality of interest." [*Id.* at 59, quoting 45 CJ, Negligence, § 220, pp 809-810.]

The Court noted that there was evidence that "other members of the party were using the rear room" and that the "door leading from such room onto the platform and to the alley was not locked and was open at least a part of the time during the evening." *Nezworski*, 301 Mich at 59. There was also evidence that, despite the defendant's denials, he must have been aware that his guests were using the doorway and platform as an exit to the alley. *Id.* The Court explained that the "circumstances were such that [the] plaintiff could reasonably presume that she had the same right as others to use the door, platform, and alley." *Id.* Accordingly, there was "testimony from which the jury could reasonably find that [the] plaintiff, when using the doorway and platform leading to the alley, was an invitee, and not a trespasser." *Id.* at 60. Because the plaintiff was an invitee when she entered onto the platform, the defendant had the requisite duty to warn or otherwise protect her from the hidden danger posed by the platform's condition. *Id.* at 60-61.

In this case, Buhalis testified that she had ridden her tricycle to the Abbey before and parked it on the patio near the entrance. There was also evidence that the Abbey's employees had seen her do so in the past. Indeed, she parked her tricycle in front of the Abbey's office window. There was also no evidence that the patio was actually or constructively closed for the winter; there was no sign or barrier to suggest that the patio was closed and there was no evidence that anyone from the Abbey had told her that she could not use the patio. In addition, when asked whether he salted the patio area, the Abbey's maintenance man, Joshua Shock, answered: "No, we never did that, unless—if we have extra time or we weren't really busy that day, then maybe, but never." This evidence permits an inference that Buhalis had used the patio with the knowledge and

implied consent of the Abbey's staff. Shock's testimony further established that the Abbey's maintenance staff would, if they had time, clear the patio—presumably for use by the Abbey's residents and visitors. Accordingly, there was evidence from which a jury could find that Buhalis's use of the patio area—even during winter—was "consistent with the intentions and purposes of the owner or occupant," so that Buhalis reasonably believed that her "use [was] in accordance with the design for which the place is adapted and allowed to be used in mutuality of interest." *Id.* at 59 (quotation marks and citation omitted). For that reason, there was a question of fact as to whether Trinity had a duty to warn or protect Buhalis from the hazards posed by snow and ice on the patio. *Stitt*, 462 Mich at 595; *Bertrand*, 449 Mich at 617.

The majority concludes that Trinity had no duty to clear the patio of snow and ice because the patio was closed for the winter. That is, it essentially *finds* that Buhalis was a *trespasser* to the extent that she strayed from the path that Trinity cleared to its main entrance. To make this finding, the majority must have rejected the evidence that would permit a jury to find that Buhalis reasonably believed that she had the right to use the patio to park her tricycle and did so with Trinity's implied consent. But this Court—like the trial court below—is not permitted to weigh the evidence or assess credibility on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, it must review all the evidence in the light most favorable to the nonmoving party. *Id.* And, given the evidence actually presented by the parties, there is a question of fact as to whether Buhalis was an invitee at the time and place of her fall. If she was an invitee, then Trinity had a duty to warn or protect her from the hazards that were on the patio.

In addition to improperly weighing the evidence, the majority also uses the facts of this case to fundamentally alter the duty that premises possessors owe to warn or protect their invitees from snow and ice. Under the majority's new rule, a rule previously unknown to Michigan law, a premises possessor no longer has any duty to clear snow and ice except to provide a path to the "main entrance." Apparently, a premises possessor's invitees now "assume the risk" for harms from the hazards posed by snow and ice on the paths leading to every entrance other than the main entrance and for any other outdoor area that the premises possessor has invited the general public to use during the winter but chooses not to clear of snow and ice. Moreover, I cannot agree with the majority's apparent conclusion that Trinity necessarily satisfied its duty by posting a sign warning that the main path might be slippery. It is well settled that, although the existence of a duty will often be a question of law, it is for the jury to decide "whether [the defendant's] conduct in the particular case is below the general standard of care" unless reasonable minds could not differ. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977). Here, a reasonable jury could conclude that, given the danger posed by black ice and the likelihood that its invitees would not discover the ice, Trinity should have taken additional steps to abate the hazard beyond posting a sign.

I also cannot agree with the majority's conclusion that ice is an open and obvious danger as a matter of law because there was evidence that an average person of ordinary intelligence would not notice the ice on casual inspection.

B. OPEN AND OBVIOUS DANGERS

Even though there is a question of fact as to whether Trinity owed a duty to Buhalis as an invitee

on the patio, Trinity would not owe Buhalis any duty if the ice at issue was an open and obvious danger. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-519; 629 NW2d 384 (2001). The open and obvious danger doctrine is not an exception to the duty owed by a possessor of land, but a part of its definition. *Id.* at 516. A premises possessor need not protect an entrant onto the land from an obvious danger, because an obvious danger is no danger to a reasonably careful person. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008). Whether a hazard was open and obvious is determined by an objective standard. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A dangerous condition is open and obvious when the hazard is one that an average person of ordinary intelligence would have discovered upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

Buhalis testified at her deposition that, before she fell, she "look[ed] to see if there was any ice," but "didn't see any." It was only after she fell that she saw the ice that caused her fall. Further, although Buhalis acknowledged that she saw the ice after her fall and could have seen the ice had she looked down at it, taken in context, it is evident that the ice was only visible through close inspection near the ground—not through casual inspection while walking. Further, there was no evidence that there were other conditions that, when considered in context, would have placed a reasonable person on notice that there was ice at that *specific* location. See *Slaughter*, 281 Mich App at 482-484. Given this evidence, I also conclude that the trial court erred to the extent that it determined that the ice was an open and obvious danger as a matter of law. Whether

the ice constituted an open and obvious hazard is a question for a jury, not the court.

In concluding that the ice involved in this case was an open and obvious danger, the majority—in part—perpetuates the fallacy that a person's general knowledge about the potential for snow and ice is the same as having specific knowledge about the existence of a particular patch of snow and ice.[1] But the open and obvious danger doctrine is premised on the concept that a reasonably prudent person in the invitee's circumstances would have *actual* knowledge of a *specific* hazard—not that a reasonably prudent person would understand the mere possibility that a hazard might, in theory, exist somewhere. Courts rightly assume that a person will easily avoid a hazard that he or she can readily observe. *Slaughter*, 281 Mich App at 478. But it is fundamentally wrong to require invitees to avoid hazards that an average person of ordinary intelligence would not notice on casual inspection just because such a person generally understands that such hazards exist. By validating this fallacy, courts essentially abrogate a premises possessor's duty to clear snow and ice, because all snow and ice—whatever the surrounding circumstances and without regard to whether it is, in fact, obvious—is an open and obvious danger as a matter of law. But, whatever the merits of that position as a matter of public policy, it remains the law in this state

[1] This fallacy, of course, can be misapplied to eliminate the duty to warn or remediate every hazard known to man: people know that manhole covers sometimes collapse under the weight of a pedestrian, so the hazard posed by collapsing manhole covers is open and obvious, even when there is no visible evidence that a manhole cover is in danger of collapsing; similarly, everyone knows that elevators sometimes crash to the earth, so the hazard posed by a falling elevator is open and obvious to every elevator passenger, even in the absence of visible evidence that the elevator is in disrepair.

that premises possessors must take reasonable steps to safeguard their invitees from the hazards posed by accumulated snow and ice. See *Quinlivan*, 395 Mich at 257-261.[2]

I would reverse the trial court's decision to dismiss Buhalis's premises liability claim and remand for a trial on the merits.

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[2] Although it might sometimes appear to the contrary, our Supreme Court has never overruled *Quinlivan*. Instead, our Supreme Court has clarified that the duty stated in *Quinlivan* "must be understood in light of this Court's subsequent decisions in *Bertrand* [449 Mich 606] and *Lugo* [464 Mich 512]." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 333 n 13; 683 NW2d 573 (2004). Thus, premises possessors—at least in theory—continue to have a duty to take reasonable measures to diminish the hazards of snow and ice from those portions of the premises possessor's land to which they have expressly or impliedly invited their guests.

PEOPLE v SANDERS

Docket No. 303051. Submitted May 1, 2012, at Grand Rapids. Decided May 29, 2012, at 9:15 a.m.

Robert S. Sanders pleaded guilty in the Berrien Circuit Court, Angela M. Pasula, J., of delivery of less than 50 grams of heroin, second offense. He was sentenced to 23 months to 40 years in prison, a $100 fine, $1,000 in court costs, a $60 victim's rights fee, and $68 in state costs. He appealed the imposition, pursuant to MCL 769.1k(1)(b)(*ii*), of $1,000 in court costs, contending that the court was required to calculate the actual court costs of each case rather than utilize a general cost figure in felony cases.

The Court of Appeals *held*:

The court costs imposed under MCL 769.1k(1)(b)(*ii*) need not be calculated for each individual case, however, there must be a reasonable relationship between the costs imposed and the actual costs incurred by the trial court. A reasonable relationship is not the same as an exact relationship. The court may consider its overhead costs in determining the costs figure. The trial court's decision to impose court costs is affirmed. However, because the trial court did not adequately explain the basis for its use of the $1,000 figure, the case is remanded to the trial court for it to conduct a hearing to establish the factual basis for its use of the $1,000 figure as the reasonable costs figure for felony cases in the Berrien Circuit Court or to alter that figure as the established factual basis may necessitate. Defendant must be afforded the opportunity to challenge that determination.

Affirmed in part and remanded.

COSTS — COURT COSTS — CALCULATION OF COURT COSTS — FELONY CASES.

Court costs imposed under MCL 769.1k(1)(b)(*ii*) need not be calculated separately in each individual case but there must be a reasonable relationship between the costs imposed and the actual costs incurred by a trial court; a trial court may consider its overhead costs in determining the court costs; a court may establish a reasonable costs figure applicable to all felony cases in the court but must provide an adequate basis to support that figure.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people.

John W. Ujlaky for defendant.

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

SAWYER, J. We are presented in this case with the question whether a trial court must engage in an exact calculation of the amount of court costs incurred before imposing those costs under the provisions of MCL 769.1k(1)(b)(*ii*). We hold that no such precise calculation is required and that a trial court may impose a reasonable amount of costs under the statute without needing to show the exact amount of costs incurred in a particular case.

Defendant pleaded guilty of delivery of less than 50 grams of heroin, second offense.[1] He was sentenced to 23 months to 40 years in prison, a $100 fine, $1,000 in court costs, a $60 victim's rights fee, and $68 in state costs.

Defendant's sole issue on appeal is a challenge to the imposition of $1,000 in court costs. While defendant concedes that the trial court had the statutory authority to impose such costs, he argues that the trial court abused its discretion by doing so because there was no factual basis for the amount of costs ordered. We affirm in part and remand in part.

Defendant challenged the amount of costs imposed in a motion to correct his sentence. The trial court denied the motion, concluding that "MCL 769.1k places no restrictions on the Court at sentencing for the imposi-

[1] MCL 333.7401(2)(a)(*iv*) and MCL 333.7413(2).

tion of costs." The trial court also stated that the "statute does not require the Court to delineate or otherwise show a factual basis for the costs imposed." Nonetheless, the trial court further stated that defendant's "costs of $1,000 were reasonable and not an abuse of the Court's discretion given the number of felony cases that the Court adjudicates on a yearly basis, the Court's limited budget, and the standard costs of processing and adjudicating a case." In other words, the trial court essentially found that $1,000 in costs was a reasonable amount to impose in a felony case, though it may not be directly related to this particular case.

The trial court is correct that MCL 769.1k(1)(b)(*ii*) authorizes the imposition of costs without any explicit limitation:

> (b) The court may impose any or all of the following:
>
> * * *
>
> (*ii*) Any cost in addition to the minimum state cost set forth in subdivision (a).

Where statutory language is clear, it is to be enforced as written.[2] And the term "[a]ny cost" is clear.

Defendant does not challenge the trial court's authority to impose costs under this provision, but argues that the trial court had to provide a more precise basis for the costs imposed. That is, the trial court appears to have established a general costs figure that it utilizes in felony cases, while defendant takes the position that the trial court must calculate a more precise figure for each individual case. We disagree with defendant's argument that the costs must be calculated for each individual

[2] *People v Lloyd*, 284 Mich App 703,707; 774 NW2d 347 (2009).

case, though we do agree that the trial court must provide a more concrete basis for the general costs figure utilized.

Defendant primarily relies on two cases, *People v Wein*[3] and *People v Dilworth*[4]. Defendant's reliance on both cases is misplaced. *Wein* provides little guidance in the case at bar. First, it was decided almost 40 years before the enactment of the statute at issue in the case at bar. Second, it provides a limited discussion of the costs issue, merely stating that the trial court's "imposition of payment of costs sets forth no basis for its computation nor does the record disclose an adequate basis therefor."[5] This hardly establishes that the trial court in the case at bar was obligated to give a more detailed explanation of the costs imposed under a statute adopted almost four decades later.[6]

Dilworth is only slightly more on point. *Dilworth*, however, considered a number of statutes related to the ordering of the payment of the costs of a prosecution.[7] It did not consider the specific statutory provision at issue here. Defendant places particular emphasis on the following passage from *Dilworth*:[8]

> When authorized, the costs of prosecution imposed "must bear some reasonable relation to the expenses actually incurred in the prosecution." *People v Wallace*, 245 Mich 310, 314; 222 NW 698 (1929). Furthermore, those costs may *not* include "expenditures in connection with the maintenance and functioning of governmental agencies

[3] *People v Wein*, 382 Mich 588; 171 NW2d 439 (1969).

[4] *People v Dilworth*, 291 Mich App 399; 804 NW2d 788 (2011).

[5] *Wein*, 382 Mich at 592.

[6] See *Lloyd*, 284 Mich App at 709 n 2.

[7] *Dilworth*, 291 Mich App at 400-401.

[8] *Id*. at 401.

> that must be borne by the public irrespective of specific violations of the law." *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952).

But this passage illustrates the distinction between *Dilworth* and the case at bar. *Dilworth* considered imposing the costs of the prosecution and not court costs under the statutory provision at issue here. And the cases relied on by *Dilworth* not only did not consider the statutory provision at issue here, but predate that statute by decades.

Because the statute at issue here involves the imposition of costs, we agree with *Dilworth* and the earlier cases that there must be a reasonable relationship between the costs imposed and the actual costs incurred by the trial court. But a reasonable relationship is not the same as an exact relationship. Nor does the statute preclude the consideration of the court's "overhead costs" in determining the costs figure. That is, the prohibition in *Teasdale* against costs that include "expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public"[9] is inapplicable to the imposition of court costs under the statute involved in the case at bar.

Furthermore, we would note that the Legislature itself takes a "flat fee" approach to costs. The "state costs" required under MCL 769.1j(1)(a) if the defendant is convicted of a felony is a minimum of $68, without regard to a finding that those actual costs were incurred in a particular case. Furthermore, while the provision in MCL 769.1k(1)(b)(*ii*) authorizing the imposition of "[a]ny cost" is broadly worded, other provisions are more specific, such as MCL 769.1k(1)(b)(*iii*), which authorizes the court to impose the "expenses of provid-

[9] *Teasdale*, 335 Mich at 6.

ing legal assistance to the defendant." In other words, had the Legislature wanted to require a precise determination of costs, it could have certainly required it in the statute. The Legislature seems to have endorsed a "reasonable flat fee" approach that does not require precision. We also note that, although the amount of the costs ordered was not the focus of the decision in *Lloyd*, the trial court in *Lloyd* had ordered $600 in costs. Thus, it would seem that other trial courts may have adopted a "flat fee" approach to costs as well.

For these reasons, we conclude that a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case, and we affirm the trial court's decision to do so in this case. But we are not persuaded that the trial court adequately explained the basis for its use of the $1,000 figure. While the assessment of $1,000 in court costs is not obviously unreasonable, as a $1 million assessment would be, neither is it inherently reasonable on its face without further justification. In other words, a remand in this case is necessary in order to facilitate meaningful appellate review of the reasonableness of the costs assessed defendant.

Accordingly, while we conclude that the costs imposed in this case were authorized by statute, we remand this matter to the trial court to conduct a hearing to establish the factual basis for the use of the $1,000 figure, or to alter that figure as the established factual basis may necessitate. While defendant is to be afforded the opportunity to challenge the reasonableness of the costs figure, we reiterate that the costs figure does not need to be particularized in each individual case, and it is not the purpose of this hearing on remand to do so in this case. Rather, the purpose of this

hearing is to factually establish the reasonable costs figure for felony cases in the Berrien Circuit Court, while affording defendant the opportunity to challenge that determination.

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We retain jurisdiction.

WHITBECK, P.J., and HOEKSTRA, J., concurred with SAWYER, J.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered June 18, 2012:

PEOPLE v BRANTLEY, Docket No. 298488. Reported at 296 Mich App 546. The Court orders that the concurring and dissenting opinion in this case, which was issued for publication on May 17, 2012, be amended to correct a clerical error.

The first and second sentence of the first full paragraph (on page 3)* shall read: "In reaching its conclusion, I believe the majority re-writes the legislation to say something it does not. The majority would reform the statute to say what the majority believes it ought to say rather than what the legislature has clearly and unequivocally stated." In all other respects, the May 17, 2012, concurring and dissenting opinion remains unchanged.

Order Entered June 21, 2012:

HOWARD v KOWALSKI, Docket No. 297066. Reported at 296 Mich App 664. The Court orders that the May 29, 2012, published opinion per curiam in this case is amended in two respects.

First, the opening sentence of the first paragraph on page 6** is amended to read:

Following the trial court's advice, and as he did in his opening statement, plaintiff's counsel argued that the defense in this case was fabricated, that the Dr. Urse's affidavit indicated that there was no meeting between Dr. Urse and Dr. Kowalski, and that Dr. Urse did not come to Mrs. Johnson's room between 2:53 and 3:00 p.m. as the two doctors testified."

Second, footnote 2 is added to the fourth sentence of the final paragraph on page 6** so that the sentence and footnote shall read:

Because they are inconsistent, plaintiff argues, the trial court should have admitted them for impeachment purposes.[2]

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[2] We note that MRE 411 plays no role in this decision. MRE 411 does not preclude evidence of liability insurance if introduced for relevant reasons other than proving that a person acted negligently or otherwise wrongfully. Dr. Urse is not a party to this action. The communications between plaintiff's counsel and the claims representative for Dr. Urse's insurer are admissible because they bear on Dr. Urse's credibility as a witness, not on his conduct on the day in question.

In all other respects, the May 29, 2012, opinion remains unchanged.

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* Reference to slip opinion. See 296 Mich App 546, 562-563—REPORTER.

** References to slip opinion. See 296 Mich App 664, 675-676—REPORTER.

Index-Digest

INDEX–DIGEST

but for counsel's unprofessional errors, the result of the proceeding would have been different; a reviewing court must strongly presume that counsel's conduct falls within the wide range of reasonable professional assistance because there are numerous ways to provide effective assistance in any given case; a trial counsel's acts or omissions fall within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission, there might have been a legitimate strategic reason for it; to prevail, the defendant must demonstrate that there is a reasonable probability that the outcome would have been different in the absence of the deficient performance (US Const, Am VI; Const 1963, art 1, § 20). *People v Gioglio (On Remand)*, 296 Mich App 12.

STATUTES

2. MCL 257.709, as amended by 2000 PA 127, which prohibited a person from driving a motor vehicle with a dangling ornament or other suspended object that obstructed the vision of the driver of the vehicle except as authorized by law, was not unconstitutionally vague. *People v Dillon*, 296 Mich App 506.

CONSTRUCTION CONTRACTS—*See*

CONTRACTS 1

CONSTRUCTION OF STATUTES—*See*

TAXATION 2

CONTEMPT

GOVERNMENTAL IMMUNITY

1. Under the government tort liability act, MCL 691.1401, *et seq*., a governmental agency is immune from tort liability for all civil wrongs if the governmental agency is engaged in the exercise or discharge of a governmental function; however, MCL 691.1407 does not bar recovery if a plaintiff successfully pleads and establishes a nontort cause of action such as an action for contempt, even though the underlying facts could have also established a tort cause of action; the cause of action must be separate and distinct from the action grounded in tort liability. *In re Bradley Estate*, 296 Mich App 31.

CONTRACTS

See, also, INDEMNITY 1

INSURANCE 6

CONSTRUCTION CONTRACTS

1. An action to recover damages for a breach of contract must be brought within six years after the claim first accrued; except in certain circumstances, a claim accrues at the time the wrong upon which the claim is based was done, regardless of when the damage results; a cause of action for breach of a construction contract accrues at the time work on the contract is completed (MCL 600.5807[8], 600.5827). *Miller-Davis Co v Ahrens Construction, Inc (On Remand)*, 296 Mich App 56.

MARRIAGE CONTRACTS

2. There is a strong presumption regarding the validity of a ceremonial marriage that can only be overcome with clear and positive proof that the marriage was not valid; in general, only the parties to a marriage can commence an annulment action; however, a party's next friend may bring an annulment action on the grounds that a party to the marriage was not capable in law of contracting because of mental incompetence; a party is legally competent to contract if he or she possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which he or she was engaged; a contract may be avoided only if the person was of unsound mind or insane when it was made and the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract (MCL 552.3; MCL 552.35). *Rodenhiser v Duenas*, 296 Mich App 268.

3. A marriage is void if consent was obtained by fraud; an action to annul a marriage on the basis of fraud can only be brought by the defrauded spouse while both parties to the marriage are living, and the marriage cannot be annulled by the heirs of the spouse or other third parties, such as next friends (MCL 552.2; MCL 552.3). *Rodenhiser v Duenas*, 296 Mich App 268.

CONTROLLED SUBSTANCES

MARIJUANA

1. The Michigan Medical Marihuana Act (MMMA), MCL 333.26421, *et seq*., which permits the medical use of

marijuana by certain persons registered under the act, does not provide protection to registered uses from prosecution for a violation of MCL 257.625(8), the provision of the Michigan Vehicle Code that prohibits a person from operating a vehicle with any amount of a schedule 1 controlled substance, such as marijuana, in his or her body. *People v Koon*, 296 Mich App 223.

CORRUPT BEHAVIOR—*See*

PUBLIC OFFICERS 1, 5

CORRUPT INTENT—*See*

PUBLIC OFFICERS 3

CORRUPT NONFEASANCE—*See*

PUBLIC OFFICERS 6

COST-ALLOCATION FORMULA FOR ELECTRIC RATES—*See*

PUBLIC UTILITIES 4

COSTS

COURT COSTS

1. Court costs imposed under MCL 769.1k(1)(b)(*ii*) need not be calculated separately in each individual case but there must be a reasonable relationship between the costs imposed and the actual costs incurred by a trial court; a trial court may consider its overhead costs in determining the court costs; a court may establish a reasonable costs figure applicable to all felony cases in the court but must provide an adequate basis to support that figure. *People v Sanders*, 296 Mich App 710.

COSTS OF DRAIN APPORTIONMENT—*See*

DRAINS 1

COURT COSTS—*See*

COSTS 1

COURTS

JURISDICTION

1. District courts in Michigan have exclusive jurisdiction, under MCL 600.8301(1), over civil matters where the amount in controversy does not exceed $25,000 and equi-

table jurisdiction and authority, under MCL 600.8302(1) and (3), concurrent with that of the circuit court with respect to claims arising under chapter 57 of the Revised Judicature Act, MCL 600.5701 *et seq*., which concerns summary proceedings to recover possession of premises; the grant of power in MCL 600.8302(1) and (3) is a more specific grant of jurisdictional authority than the general grant of jurisdictional authority in MCL 600.8301(1) and takes precedence over the general grant of jurisdictional authority; when a district court's actions flow from its power arising under chapter 57 of the RJA, its actions are within the scope of MCL 600.8302(1) and (3), and MCL 600.8301(1) is inapplicable. *Clohset v No Name Corp*, 296 Mich App 525.

2. Subject-matter jurisdiction is established by the pleadings and exists when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous. *Clohset v No Name Corp*, 296 Mich App 525.
3. Once a court of competent jurisdiction has become possessed of a case, its authority continues subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of coordinate authority may interfere with its action; a matter is finally and completely resolved when a judgment is entered; a "judgment" is the final consideration and determination of a court of competent jurisdiction on the matters submitted to the court. *Clohset v No Name Corp*, 296 Mich App 525.
4. Once a court's jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, will not render the court's judgment void, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked; lack of subject-matter jurisdiction may be collaterally attacked, whereas the exercise of subject-matter jurisdiction can be challenged only on direct appeal. *Clohset v No Name Corp*, 296 Mich App 525.

CREDITORS—*See*

MORTGAGES 1

as including murder committed in the perpetration of first- and second-degree vulnerable-adult abuse; the prosecution need not prove that a defendant committed both first-degree vulnerable-adult abuse and second-degree vulnerable-adult abuse to support a conviction of felony murder on this basis (MCL 750.145n, 750.316[1][b]). *People v Comella*, 296 Mich App 643.

LARCENY FROM THE PERSON

5. Larceny from the person requires the prosecution to prove (1) the taking of someone else's property without consent, (2) movement of the property, (3) the intent to steal or permanently deprive the owner of the property, and (4) that the property was taken from the person or from the person's immediate area of control or immediate presence; larceny from the person is not accomplished if the victim and the perpetrator are merely in sight or hearing range of each other (MCL 750.357). *People v Smith-Anthony*, 296 Mich App 413.
6. *People v Brantley*, 296 Mich App 546.

MOTOR VEHICLES

7. Under MCL 257.904(1) and (4), a person whose motor vehicle operator's license has been suspended or revoked, a person whose application for a license has been denied, or a person who has never applied for a license is guilty of a felony if he or she operates a motor vehicle on the public highways or other places open to the general public or generally accessible to motor vehicles and by that operation causes the death of another person; MCL 257.904(1) and (4) do not apply to or penalize a person driving a motor vehicle with an expired license. *People v Acosta-Baustista*, 296 Mich App 404.
8. Pursuant to articles VI and VII of the Convention on the Regulation of Inter-American Automotive Traffic 1943, the United States and Mexico have reciprocity with each other so that a person licensed in one country is allowed to operate a motor vehicle in the other country while using that foreign license; a person's immigration status does not affect the driving privileges afforded by the convention or the application of MCL 257.904(1) and (4), which prohibit operating a motor vehicle with a suspended or revoked license or without having applied for a license and by that operation causing another's death. *People v Acosta-Baustista*, 296 Mich App 404.

OPERATING A MOTOR VEHICLE WHILE INTOXICATED

9. A person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, if the person is operating while intoxicated; "operate" is defined as being in actual physical control of a vehicle and includes the situation of a person who starts the vehicle's engine, applies the brakes, and shifts the gears from park to reverse and back to park without actually moving the vehicle (MCL 257.625[1], 257.35a). *City of Plymouth v Longeway*, 296 Mich App 1.

PUBLIC OFFICERS

10. The statute regarding willful neglect of duty by a public officer expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance) (MCL 750.478). *People v Waterstone*, 296 Mich App 121.

RACKETEERING

11. MCL 750.159i(1) prohibits a person employed by or associated with an enterprise from knowingly conducting or participating in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity; to establish a violation of this provision, the prosecution must show that the defendant was employed by or associated with a separate and distinct individual or any other legally distinct entity falling within the definition of "enterprise" in MCL 750.159f(a); a defendant acting alone cannot be both the person and the enterprise. *People v Kloosterman*, 296 Mich App 636.

SELF-DEFENSE

12. The defense of self-defense is available to a defendant charged with possession of a firearm during the commission of a felony (MCL 750.227b; MCL 780.972). *People v Goree*, 296 Mich App 293.

SENTENCES

13. A trial court may assess 10 points for offense variable 10 (exploitation of victim) if the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or if the offender abused his or her authority status; in the context of offense variable 10, a domestic relationship is a familial

islative and executive branches to conform their actions to constitutional requirements or confine them within constitutional limits; only when declaratory relief has failed should the courts even begin to consider additional forms of relief, such as injunctive relief. *Davis v City of Detroit Financial Review Team*, 296 Mich App 568.

DEEDS

QUITCLAIM DEEDS

1. A quitclaim deed conveys to the grantee the grantor's complete interest or claim in certain real property unless some interest is expressly excepted or reserved. *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336.

DEFENSES—*See*

CRIMINAL LAW 12

DEFINITION OF OPERATING—*See*

CRIMINAL LAW 9

DISCRETION TO IMPOSE HABITUAL-OFFENDER ENHANCEMENT—*See*

SENTENCES 1

DISTRICT COURTS—*See*

COURTS 1

DOMESTIC RELATIONSHIPS—*See*

CRIMINAL LAW 13

DOMICILE DEFINED—*See*

INSURANCE 10, 12

DOMICILE OF MINOR CHILD—*See*

INSURANCE 11, 12

DOMICILED IN THE SAME HOUSEHOLD—*See*

INSURANCE 11, 12

DRAINS

APPORTIONMENTS OF DRAIN COSTS

1. When the apportionment of the costs of improvements

HEARSAY

1. The tender-years hearsay exception provides that a statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding if (1) the declarant was under the age of 10 when the statement was made, (2) the statement is shown to have been spontaneous and without indication of being manufactured, (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance, and (4) the statement is introduced through the testimony of someone other than the declarant; if the declarant made more than one corroborative statement about the alleged incident, only the first is admissible; questioning by an adult is not incompatible with a ruling that a child's hearsay statement was spontaneous; for a child's report of sexual abuse to have been spontaneous, the child must have broached the subject of sexual abuse and any questions from adults must have been nonleading or open-ended; a child's young age, without more supporting testimony, does not constitute an equally effective circumstance that would explain the lack of disclosure for a lengthy period and excuse the delay (MRE 803A). *People v Douglas*, 296 Mich App 186.

IMPEACHMENT

2. Under MRE 613(b), a prior inconsistent statement of a witness is admissible to impeach the credibility of the witness; the rule excluding hearsay, MRE 802, does not apply to the admission of a prior inconsistent statement because it is not offered as substantive evidence to prove the truth of the matter asserted, MRE 801(c), but is only offered to test the credibility of the witness's testimony in court; the party seeking to impeach a witness with a prior inconsistent statement must lay a foundation under MRE 613(b) by establishing that the witness made the prior statement and that the prior statement was inconsistent with the witness's in-court testimony; a statement is inconsistent if there is any material variance between the testimony and the previous statement, that is, if a jury could reasonably find that a witness who believed the truth of the facts testified to

would have been unlikely to make the prior statement; evidence is not collateral, and is thus admissible for impeachment purposes, if the fact on which the prior self-contradiction was predicated could have been shown in evidence for any purpose independently of the self-contradiction. *Howard v Kowalski*, 296 Mich App 664.

PRIVILEGES

3. Under MCL 600.2156, a minister of the gospel, a priest of any denomination, or an accredited Christian Science practitioner may not disclose confessions made to the minister, priest, or any practitioner in his or her professional character, in the course of discipline enjoined by the rules or practice of the denomination; the evidentiary privilege of MCL 767.5a(2) provides that any communications between members of the clergy and members of their respective churches are privileged and confidential when those communications were necessary to enable members of the clergy to serve as a member of the clergy; MCL 600.2156 applies only to confessions, broadly precludes a cleric from disclosing confessions in many situations, not just the courtroom, and is not an evidentiary privilege; MCL 767.5a(2), however, is more specific and creates an evidentiary privilege that precludes the incriminatory use of any communication made by a congregant to his or her cleric when that communication was necessary to enable the cleric to serve as a cleric. *People v Bragg*, 296 Mich App 433.
4. A communication is privileged under MCL 767.5a(2) when it was necessary to enable the cleric to serve as a member of the clergy; if the communication to a cleric was made in his professional character or made in the course of discipline enjoined by the rules or practice of the denomination, it was likely necessary to enable the cleric to serve as a cleric; a communication would be necessary to enable the cleric to serve as a cleric when it serves a religious function such as providing guidance, counseling, forgiveness, or discipline; a communication is made to a cleric in the cleric's professional character when it is directed to a clergyman in his or her capacity as a spiritual leader within the religious denomination; the communication may not arise from the congregant speaking to the cleric in his or her role as a relative, friend, or employer; guidance by a clerical witness about whether a communication

2. The owner or registrant of a motor vehicle required to be registered in Michigan must maintain security for the payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance; an "owner" includes a person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days (MCL 500.3101[1] and [2][h]). *Corwin v Daimler-Chrysler Ins Co*, 296 Mich App 242.
3. A personal protection insurance policy described in MCL 500.3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident; "the person named in the policy" is synonymous with the term "the named insured"; when personal protection insurance benefits are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer must pay all of the benefits and is not entitled to recoupment from the other insurer (MCL 500.3114[1]). *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242.
4. Personal injury protection coverage protects the person, not the motor vehicle; a person who sustains accidental bodily injury while an occupant of a motor vehicle must first look to no-fault insurance policies within the person's household for no-fault personal injury protection benefits; a no-fault insurance carrier can be responsible for personal injury protection benefits even if the motor vehicle it insures was not the actual motor vehicle involved in the accident (MCL 500.3101[1]; MCL 500.3114[1]). *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242.
5. When two or more insurers are in the same order of priority to provide personal injury protection benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority (MCL 500.3115[2]). *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242.
6. Reformation of an insurance policy is an equitable remedy; when reasonably possible, courts are obligated to construe insurance contracts that conflict with the no-fault act, and therefore violate public policy, in a

manner that renders them compatible with public policy as reflected in the act. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242.

7. An insured must have an insurable interest to support the existence of a valid motor vehicle liability insurance policy; the insurable interest must be that of a named insured; the insurable interest need not be in the nature of ownership and an individual can have an insurable interest without having title to the vehicle; an insurable interest can be any kind of benefit from the thing so insured or any kind of loss that would be suffered by its damage or destruction; a person has an insurable interest in his or her own health and well-being and such interest entitles an insured person to personal protection benefits under the no-fault act regardless of whether a covered vehicle is involved. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242.
8. Michigan's public policy forbids the issuance of an insurance policy where the insured lacks an insurable interest; owners and registrants have an insurable interest in their motor vehicles because the no-fault act requires them to carry no-fault insurance and makes it a misdemeanor to fail to do so; the insurable interest of owners and registrants is, therefore, contingent upon personal pecuniary damage created by the no-fault act (MCL 500.3102[2]). *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242.
9. A person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days is neither the owner nor registrant of the vehicle and does not have an insurable interest in the vehicle contingent upon personal pecuniary damage created by the no-fault act (MCL 500.3101[2][h][*ii*] and [i]). *Corwin v Daimler-Chrysler Ins Co*, 296 Mich App 242.
10. The terms "domicile" and "residence" are legally synonymous for purposes of the no-fault insurance act (MCL 500.3101 *et seq*.). *Grange Ins Co of Michigan v Lawrence*, 296 Mich App 319.
11. Factors to consider in determining if a person is "domiciled in the same household" as the named insured include (1) the subjective or declared intent of the person of remaining, either permanently or for an

plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685.

2. A possessor of land is not an absolute insurer of an invitee's safety; an owner of land generally owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land; in the absence of special aspects, this duty does not extend to open and obvious dangers; only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will remove that condition from the open-and-obvious-danger doctrine. *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685.
3. When dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee; the hazards presented by snow and ice are generally open and obvious and the landowner has no duty to warn of or remove the hazard; if a condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open-and-obvious-danger doctrine will cut off liability if the invitee should have discovered the condition and realized its danger; recovery is not allowed if the condition is so common that the possibility of its presence is anticipated by prudent persons; a landowner's duty of reasonable care is not breached when a premises possessor provides a clear means of ingress and egress and the invitee strays off the normal pathway onto an area that is obviously not reserved for that purpose. *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685.

MISCONDUCT IN OFFICE

2. Misconduct in office was defined under the common law as corrupt behavior by an officer in the exercise of the duties of his or her office or while acting under color of his or her office; an officer could be convicted for committing any act that is itself wrongful (malfeasance), for committing a lawful act in a wrongful manner (misfeasance), or for failing to perform any act that the duties of the office require of the officer (nonfeasance). *People v Waterstone*, 296 Mich App 121.
3. The requisite intent for a charge of misconduct in office under the common law is the intent to engage in corruption or corrupt behavior; corrupt intent can be shown when there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of a public office by an officer (MCL 750.505). *People v Waterstone*, 296 Mich App 121.

WILLFUL NEGLECT OF DUTY

4. The crime of willful neglect of duty under MCL 750.478 is the same as the crime of misconduct in office under the common law in relation to a nonfeasance theory of prosecution. *People v Waterstone*, 296 Mich App 121.
5. MCL 750.478, which punishes a public officer's willful neglect to perform a legal duty, necessarily encompasses the element of corrupt behavior, which is also an element of the common-law offense of misconduct in office committed through nonfeasance for purposes of a prosecution under MCL 750.505; there is no corrupt-behavior distinction between the two statutes. *People v Waterstone*, 296 Mich App 121.
6. Willful neglect of duty and corrupt nonfeasance are effectively the same; if a public officer willfully neglects to perform a legal duty the officer has engaged in corruption or corrupt behavior. *People v Waterstone*, 296 Mich App 121.
7. The term "willful" in the statute regarding willful neglect of duty by a public officer encompasses a knowledgeand purpose to commit a wrong while committing an intentional act of nonfeasance; a willful neglect of a duty required by law to be performed by an officer, i.e., deliberate forbearance, necessarily entails the intent to intentionally, knowingly, and purposely misbehave and engage in wrongful conduct; this intent is identical to the corrupt

intent needed to establish misconduct in office under the common law (MCL 750.478; MCL 750.505). *People v Waterstone*, 296 Mich App 121.

8. The term "neglect," within the context of the statute regarding willful neglect of duty by a public officer, means a failure to perform a legal duty, not negligence; a willful failure to perform does not encompass negligent conduct (MCL 750.478). *People v Waterstone*, 296 Mich App 121.

PUBLIC UTILITIES

ELECTRIC UTILITIES

1. The Public Service Commission does not have authority to approve or direct the use of a rate-decoupling mechanism by electric providers to adjust for sales volumes above or below projected levels (MCL 460.1097[4]). *In re Applications of Detroit Edison Co*, 296 Mich App 101.

PUBLIC SERVICE COMMISSION

2. Utilities regulated by the Public Service Commission (PSC) are not required to raise money for the Low-Income and Energy Efficiency Fund because its enabling legislation was deleted from the Customer Choice and Electric Reliability Act, MCL 460.10 *et seq*.; under its general regulatory powers provided in MCL 460.6a(2), the PSC does not have authority to approve a utility's collecting money as an operation and maintenance expense from its ratepayers to fund a program to help ratepayers who have difficulty paying their energy bills or to administer a program to promote energy efficiency in general. *In re Applications of Detroit Edison Co*, 296 Mich App 101.

3. The Public Service Commission's approval of a utility's experimental program is not reviewed for an abuse of discretion; rather, recovery of the experimental program's costs must be just and reasonable and the commission's approval must be supported by competent, material, and substantial evidence on the whole record; competing program considerations, the neces-

thus, the State Treasurer, when acting in his or her executive capacity with authority either generally derived from the Constitution or specifically derived from statute, is not a public body under the OMA (MCL 15.262[a]). *Davis v City of Detroit Financial Review Team*, 296 Mich App 568.

2. To be a public body under the Open Meetings Act (OMA), the entity at issue must be a state or local legislative or governing body that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; that an entity exercises governmental authority is not itself dispositive of whether it is a public body; the entity must also be a legislative or governing body; a financial review team appointed under the Local Government and School District Fiscal Accountability Act is not a legislative or governing body and, therefore, is not a public body under the OMA (MCL 15.261 *et seq*., MCL 141.1501 *et seq*.). *Davis v City of Detroit Financial Review Team*, 296 Mich App 568.

TAXATION

CLAIMS FOR TAX REFUNDS

1. MCL 205.27a(2) prohibits a taxpayer from claiming a refund of any amount paid to the Department of Treasury more than four years after the date set for filing the original return; MCL 205.27a(3)(a) suspends the run-

ning of this four-year limitations period while a final determination of tax is pending and for one year after that; MCL 205.27a(2) and MCL 205.27a(3) apply consecutively if a taxpayer pursues a final determination of tax liability. *Krueger v Dep't of Treasury*, 296 Mich App 656.

EXEMPTIONS

2. Tax exemption statutes are to be strictly construed in favor of the taxing unit; an exemption cannot be made out by inference or implication but must be found to have been intended by the Legislature beyond a reasonable doubt. *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336.

INCOME TAX

3. MCL 206.325(2) requires a taxpayer to file an amended return with the Department of Treasury showing any final alteration in or modification of the taxpayer's federal income tax return that affects the taxpayer's taxable income under part 1 of the Income Tax Act, MCL 206.1 through MCL 206.532, within 120 days of the alteration or modification; the 120-day filing requirement is not a separate statute of limitations that supersedes the four-year limitations period set forth in MCL 205.27a(2). *Krueger v Dep't of Treasury*, 296 Mich App 656.

SALES TAX

4. The General Sales Tax Act, MCL 205.51 *et seq*., imposes a tax on retail sales of tangible personal property within the state of Michigan and is imposed on the retailer for the privilege of engaging in the business of making retail sales; because retailers have the ultimate responsibility to pay any sales tax on those transactions, the Department of Treasury may not place a duty on a purchaser to show that the sales tax was paid to the state. *Andrie Inc v Dep't of Treasury*, 296 Mich App 355.

SINGLE BUSINESS TAX

5. Under MCL 208.45 of the former Single Business Tax, a formula involving three ratios—the property factor, the payroll factor, and the sales factor—was used to apportion taxing authority for goods and services between two taxing states and calculate the adjusted tax base, which was then used to calculate the single business tax liability; under former MCL 208.52(b) sales of tangible

personal property could be sourced to Michigan for purposes of calculating the sales factor only if the product had been shipped or delivered to a customer within Michigan; the sale of property would not be sourced on the basis of where the sale occurred. *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93.

6. Royalties do not constitute sales receipts for purposes of the definition of "sales" in MCL 208.7(1) of the former Single Business Tax Act because they do not arise from a transaction in which the royalty income was consideration for the transfer of possession of property; a royalty is compensation paid to the owner of certain types of property, such as intangible property or natural resources, for the use of that property; royalty income derives from the transfer of the right to use property, not from the transfer of possession of property. *Kelly Services, Inc v Dep't of Treasury*, 296 Mich App 306.
7. Income generated from royalties and rents were mutually exclusive categories for purpose of the former Single Business Tax Act (SBTA) given their differing natures and treatments; royalty income does not constitute rental or lease receipts for purposes of the definitions of "sales" and "gross receipts" in former MCL 208.7(1) and (3) of the SBTA. *Kelly Services, Inc v Dep't of Treasury*, 296 Mich App 306.

USE TAX

8. Property sold to a person engaged in a business enterprise that then uses and consumes the property in the breeding, raising, or caring for livestock, poultry, or horticultural products is entitled to the agricultural-production exemption from use tax provided in the Use Tax Act; a person must be both engaged in a business enterprise and use and consume the property in the breeding, raising, or caring for livestock, poultry, or horticultural products to be entitled to the exemption (MCL 205.94[1][f]). *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232.
9. The Use Tax Act, MCL 205.91 *et seq*., imposes a tax on the purchaser for the privilege of using, storing or consuming tangible personal property in this state; under MCL 205.94(1)(j) a purchase is exempt from the use tax (1) if a vessel was designed for commercial use of registered tonnage of 500 tons or more, if produced upon special order of the purchaser, and (2) if the purchase